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Supreme Court, U.S.
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In the

Supreme Court of the United States

AMMEX, INC.,

Petitioner,

v.

UNITED STATES,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Federal Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether the United States Customs Service ("Customs") has the power to contravene the Court of International Trade's ("CIT's") prior construction of Sections 555 and 557 of the Omnibus Trade and Competitiveness Act of 1988 ("OTCA"), 19 U.S.C. §§ 1555 and 1557, which the CIT held permitted the duty-free sale of motor fuel from a duty-free sales enterprise.

II. Whether the federal motor fuel excise tax, 26 U.S.C. § 4081, which was applicable during the prior litigation, is a "new fact" sufficient to avoid *res judicata* effect in a second litigation to enforce the CIT's prior determination that the OTCA permitted a duty-free sales enterprise to sell motor fuel on a duty-free basis.

CORPORATE DISCLOSURE STATEMENT

Centra, Inc. is Petitioner's parent corporation. No publicly held companies own 10 percent or more of the stock of Petitioner.

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The opinion of the Federal Circuit Court of Appeals is reported at *Ammex, Inc. v. United States*, 334 F.3d 1052 (Fed. Cir. 2003) ("Opinion") (App., *infra*, 1a). The CIT opinions are reported at *Ammex, Inc. v. United States*, 116 F. Supp. 2d 1269 (Ct. Int'l Trade 2000) ("*Ammex I*") (App., *infra*, 26a) and *Ammex, Inc. v. United States*, 193 F. Supp. 2d 1325 (Ct. Int'l Trade 2002) ("*Ammex II*") (App., *infra*, 12a).

JURISDICTION

The judgment of the United States Court of Appeals for the Federal Circuit was entered on July 1, 2003 (App., *infra*, 1a). A timely petition for rehearing *en banc* was denied on October 7, 2003 (App., *infra*, 24a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Since the United States is a party in this lawsuit, the Solicitor General of the United States has been served with this Petition for Certiorari via United States Mail, at Room 5614, Department of Justice, 950 Pennsylvania Avenue, N.W., Washington, D.C. 20530-0001.

RELEVANT PROVISIONS

The relevant provisions of the OTCA, 19 U.S.C. §§ 1555 and 1557, are reproduced at App., *infra*, 66a, 75a. The relevant portion of the Internal Revenue Code, 26 U.S.C. § 4081, is reproduced at App., *infra*, 79a.

STATEMENT

A. Introduction

This case raises important questions relating to the power of a federal agency to contravene an Article III court's judicial construction of a statute and the finality of such judicial decisions. The case arises from a long running dispute concerning whether the OTCA authorizes Petitioner to sell motor fuel, on a duty and tax free basis, from its duty-free sales enterprise located in Detroit, Michigan. Petitioner's duty-free facility is situated adjacent to the Ambassador Bridge connecting the United States and Canada, which is one of the busiest international commercial freight crossings in the United States.

On December 23, 1993, Customs, which regulates duty-free sales enterprises under the OTCA, tentatively approved Ammex's sterile tax and duty-free facility, but excluded fuel. In 1994 and 1998 Customs issued Headquarters Rulings (App., *infra*, 44a, 53a) holding that duty-free motor fuel may not be sold at a duty-free sales enterprise because motor fuel is an "unidentifiable fungible" not subject to identification or marking as provided for in the OTCA and regulations. Because the case involves *res judicata*, it is necessary to summarize the earlier and later rulings.

Ammex I. In *Ammex I,* Petitioner successfully challenged the Headquarters Rulings in the CIT. The CIT held that "Customs acted unlawfully in prohibiting Ammex from selling duty-free gasoline and diesel fuel" and that OTCA §§ 1555 and 1557 permit "the duty-free sale of gasoline and diesel fuel from a duty-free enterprise." *Ammex I*, at 1275-76. (App., *infra*, 42a.) Customs then authorized Petitioner's duty-free motor fuel sales on September 5, 2000.

Customs' Revocation. On November 21, 2001, Customs revoked its authorization for duty-free motor fuel sales. (App., *infra*, 101a.) Customs' rationale was that application of federal motor fuel excise tax, I.R.C. § 4081, precluded Ammex's motor fuel from qualifying as conditionally duty-free merchandise and therefore the OTCA prohibited entry of such fuel into Petitioner's bonded warehouse.

Ammex II. In *Ammex II*, the case here involved, Petitioner sought to enforce the CIT's judgment in *Ammex I*. However, the CIT declined to accord *res judicata* effect to the *Ammex I* judgment. (App., *infra*, 12a, 21a-23a.) Petitioner appealed to the Federal Circuit.

The Federal Circuit Opinion. This is a petition for review of the United States Court of Appeals for the Federal Circuit Opinion, which held that:

> [t]he factual premise of the lawsuit in *Ammex II*, however, differs from the prior one [*Ammex I*] because the application of federal taxes to gasoline and diesel fuel, preempting such fuel from qualifying as "duty-free merchandise," is a new fact which was not a part of *Ammex I*. . . . Because under the relevant statute, the term 'duty-free merchandise' means 'merchandise sold by a duty-free sales

> enterprise on which neither Federal duty nor Federal tax has been assessed pending exportation from the customs territory,' 19 U.S.C. § 1555(b)(8)(E), we reject Ammex's argument that the legal claims in the two suits arise from the same 'operative nucleus of fact.'

Ammex, 334 F.3d at 1057. (App., *infra*, 9a.)

B. Statement of Facts

Under close Customs supervision, Ammex operates a "sterile" U.S. Customs Class 9 bonded warehouse, commonly known as a duty-free store or duty-free sales enterprise, from which it seeks to resume selling gasoline and diesel fuel on a duty and tax-free basis. The designation "sterile" indicates that the physical design and operation of the facility guarantees the exportation of products sold therein. Customers entering Ammex's facility have necessarily proceeded beyond the "point of no return," having exited from the United States. As a duty-free sales enterprise, Ammex sells for export certain goods "duty-free" to customers who transport those goods to Canada immediately after leaving Ammex's facility.

1. Administrative Proceedings

In 1993 Ammex applied to Customs for approval to operate as a sterile, tax and duty-free facility. On December 23, 1993, Customs tentatively approved Ammex's sterile tax and duty-free facility, but excluded fuel. On January 24, 1994, Ammex submitted to Customs additional information to persuade Customs not to exclude fuel. Customs denied authorization for duty-free motor fuel sales because, *inter alia*, such merchandise was an "unidentifiable fungible," which could not be marked or otherwise identified under 19 U.S.C. § 1555(b)(3)(D) and that therefore Customs would have no practical way of ensuring that the duty-free gasoline was "declared" when vehicles returned to the United States. *See* Customs Headquarters Ruling 225287 of June 27, 1994 ("HQ 225287"), at 4-5. (App., *infra*, 49a-51a.) Customs recognized the impact of I.R.C. § 4081 upon duty-free motor fuel sales by stating that "the real savings would be the exemption from federal . . . excise taxes." HQ 225287 at 2. (App., *infra*, 46a.)

In Customs' 1998 Headquarters Ruling 227385 ("HQ 227385"), Customs reconsidered its 1994 ruling at Ammex's request. (App., *infra*, 53a.) Analyzing the legislative history of the OTCA, which established legislative guidelines for Customs' administration of duty-free shops, Customs concluded that "the fact that Congress did not specifically reject Customs policy regarding the sale of gasoline by duty-free stores means that Congress did not object to such practice." HQ 227385 at 5. (App., *infra*, 61a.) Thus, it reasoned, "in holding that gasoline and diesel fuel may not be sold by duty-free stores, it was proper to follow the precedent established by ruling letter 200396." *Id.* In Ruling Letter 200396, the Assistant Commissioner of Customs' Office of Regulations and Rulings, Leonard Lehman, held that the activities of duty-free stores could not be extended to unidentifiable fungibles, such as gasoline sold on a retail basis, since Customs would have no practical way of ensuring that the gasoline was declared when it was returned to the United States.

Customs Ruling Letter 200396 of October 30, 1972. (App., *infra*, 47a-48a.)

2. *Ammex I* and Customs' Authorization of Duty-Free Motor Fuel Sales

In *Ammex I*, Ammex successfully challenged the Headquarters Rulings in the CIT. The CIT held that "Customs acted unlawfully in prohibiting Ammex from selling duty-free gasoline and diesel fuel" because to do so violated 19 U.S.C. § 1557(a)(1), which allowed ***"[a]ny merchandise subject to duty, with the exception of perishable articles and explosive substances"*** to be entered and withdrawn for exportation from bonded warehouses such as Ammex's duty-free store. *Id.* at 1275-76. [Emphasis added.] (App., *infra*, 34a-35a.) The CIT entered a judgment setting aside HQ 227385 and holding that "19 U.S.C. §§ 1555 and 1557 allow the duty-free sale of gasoline and diesel fuel from a duty-free enterprise." *Id.* (App., *infra*, 42a.)

Thus, on September 5, 2000, after six years of proceedings, in accordance with *Ammex I*, Customs granted Ammex's request to expand its Class 9 duty free warehouse operation to include the gasoline and diesel fuel tanks located at [Ammex's] facility. (App., *infra*, 103a.) On October 23, 2000, Ammex wrote to Customs seeking a letter to certify that the fuel sold at Ammex's duty-free store was exempt from taxes. Customs forwarded Ammex's request to the Internal Revenue Service ("IRS"). On January 8, 2001, the IRS issued an informational letter ("IRS letter") stating that I.R.C. § 4081 imposes a tax on the entry into the United States of any taxable fuel, including gasoline and diesel fuel for consumption, use, or warehousing. (App., *infra*, 104a.)

3. Customs' Subsequent Revocation Of Duty-Free Motor Fuel Sales Authorization

Within a year, Customs decided that, notwithstanding the ruling in *Ammex I*, it would not permit Ammex to sell motor fuel on a duty and tax-free basis. (App., *infra*, 110a-111a.) On June 1, 2001, Customs issued a notice proposing to revoke the September 5, 2000 authorization letter. Customs Bulletin and Decisions, Vol. 35, No. 25, at 295 ("Proposed Revocation of Letter Relating to Gasoline and Diesel Fuel From a Class 9 Customs Bonded Warehouse Also Known as a Duty-free Shop"). (App., *infra*, 95a.)

On November 21, 2001, after a notice and comment period, Customs revoked its authorization of the sale of gasoline and diesel fuel on a duty and tax-free basis, effective on January 21, 2002. Customs Bulletin and Decisions, Vol. 35, No. 47, 5 (Nov. 7, 2001) ("Revocation"). (App., *infra*, 101a.) Customs stated:

> The Internal Revenue Service has informed the Customs Service that 26 USC 4081 imposes a tax upon entry into the United States of any taxable fuel for consumption, use, or warehousing.
>
> * * *
>
> Consequently, any fuel subject to a tax when entered for warehousing under 26

> U.S.C. 4081 and the implementing Internal Revenue Service regulations cannot qualify as duty-free fuel and, therefore, cannot be entered into a class 9 warehouse pursuant to 19 U.S.C. 1555(b)(1) and the applicable Customs Regulations.
>
> Because only fuel on which neither duty nor tax has been assessed can qualify as duty-free fuel in conformity with 19 U.S.C. 1555(b)(8)(E), the Customs Service intends to revoke the Port Director's letter of September 5, 2000, to the extent that it would allow the sale under 19 U.S.C. 1555(b)(1) of fuel for which a tax was assessed under 26 U.S.C. 4081.

(App., *infra*, 104a-105a.)[1]

4. *Ammex II*

Ammex again filed suit in the CIT. In *Ammex II*, Ammex requested an order (i) enjoining Customs' Revocation under the doctrine of *res judicata* and (ii) holding Customs in contempt for violating *Ammex I*. The CIT denied Ammex's motion. *Ammex II*, 193 F. Supp. 2d at 1330. (App., *infra*, 23a.) Specifically, the CIT held that:

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[1] Although not in issue here, the OTCA expressly permits the entry of merchandise "subject to duty" to be withdrawn for exportation, 19 U.S.C. § 1557(a)(1), and, upon such exportation, for the previous duties thereon to be refunded, 19 U.S.C. § 1557(a)(2).

> The issue in *Ammex I* was not simply whether Ammex is entitled 'to sell gasoline and diesel fuel from its duty-free store in Detroit, Michigan.' Rather, the court was called upon to consider whether *the explanation* Customs provided for denying Ammex's request to sell gasoline and diesel fuel duty-free was arbitrary, capricious, or contrary to law.
>
> * * *
>
> This court [in *Ammex I*] accordingly reviewed Customs' stated reason for denying Ammex's request to sell duty-free fuel, namely, its rationale that such fuel falls under an "unidentifiable fungibles" exception to merchandise that can lawfully be entered and withdrawn for exportation from duty-free stores.

(App., *infra*, 18a-19a.)

The CIT then proceeded to its rationale as to why *Ammex I* differed from *Ammex II.*

> Implicit in both parties' briefings in *Ammex I* and the court's opinion was the presumption that the gasoline and diesel fuel at issue qualified as "duty- free merchandise" within the meaning of 19 U.S.C. § 1555(b)(8)(E). Neither party questioned this assumption, and because neither party raised a challenge, the court did not consider or rule on such an issue.

> Because of subsequent events, however, the issue has arisen as to whether gasoline and diesel fuel can qualify as "duty-free merchandise" under 19 U.S.C. § 1555(b)(8)(E), in light of information from the IRS that such fuel may be subject to tax and therefore unable to qualify as "duty-free merchandise" under the statutory definition.

Id. at 1329-30. (App., *infra*, 20a.) The CIT concluded that:

> Having determined that the issue of federal taxes as applied to gasoline and diesel fuel and the concurrent consideration of whether such application preempts such fuel from qualifying as "duty-free merchandise" was neither part nor parcél of *Ammex I*, Ammex's Motion cannot be considered by the court under the present procedural posture. Ammex's Motion asks the court "to interpret § 1555(b)(8)(E) of Title 19-a Customs statute." Ammex's Reply at 12-13. This constitutes a new matter, one which was not contemplated in *Ammex I*. It therefore cannot be said that the revocation constitutes an attack on the court's prior judgment or order in this case.

Id. at 1330. (App., *infra*, 21a.)

The United States Court of Appeals for the Federal Circuit affirmed for the reasons stated above.

REASONS FOR GRANTING THE WRIT

I. DUTY-FREE SALES ARE OF NATIONAL IMPORTANCE BECAUSE THEY EFFECT A SIGNIFICANT NATIONAL POLICY TO ENCOURAGE FOREIGN COMMERCE.

In *Xerox Corp. v. Cty. of Harris, Texas*, 459 U.S. 145, 150-51 (1982), this Court recognized the national importance of duty-free sales enterprises as a stimulant to foreign commerce:

> Government regulated, bonded warehouses have been a link in the chain of foreign commerce since 'a very early period in our history.' *Fabbri v. Murphy*, 95 U.S. 191, 197, 94 L.Ed. 468 (1877).
>
> * * *
>
> . . . Congress was willing to waive all duty on goods that were reexported from the warehouse, and to defer, for a prescribed period, the duty on goods destined for American consumption. This was no small sacrifice at a time when customs duties made up the greater part of federal revenues, but its objective was to stimulate business for American industry and work for Americans.

> In short, Congress created secure and duty free enclaves under federal control in order to encourage merchants here and abroad to make use of American ports.

Xerox Corp., 459 U.S. at 150-51; *see also McGoldrick v. Gulf Oil Co.*, 309 U.S. 414, 428-29 (1939). As construed in *Ammex I*, Congress intended "[a]ny merchandise subject to duty, with the exception of perishable articles and explosive substances" may be entered and withdrawn for exportation from bonded warehouses such as Ammex's duty-free store. *Ammex I*, at 1275-76. (App., *infra*, 31a-32a.) Contrary to the holding in *Ammex I*, Customs' effort to prohibit duty-free sales enterprises from selling another category of merchandise (i.e., motor fuel) disserves the scheme that Congress legislated.

II. CUSTOMS' REVOCATION OF DUTY-FREE MOTOR FUEL SALES AUTHORIZATION REQUIRED UNDER THE CIT'S CONSTRUCTION OF SECTIONS 555 AND 557 OF THE OTCA, 19 U.S.C. §§ 1555 AND 1557, IMPLICITLY VIOLATES THE SEPARATION OF POWERS.

The CIT in *Ammex I* had plainly decided that "19 U.S.C. §§ 1555 and 1557 allow the duty-free sale of gasoline and diesel fuel from a duty-free enterprise." *Ammex I*, at 1276. (App., *infra*, 42a.) Customs' Revocation simply decided otherwise on a different rationale. (App., *infra*, 104a-105a.) Administrative agencies may not contravene a judicial statutory construction. *Neal v. United States*, 516 U.S. 284, 295

(1996) ("Once we have determined a statute's meaning, we adhere to our ruling under the doctrine of *stare decisis*, and we assess an agency's later interpretation against that settled law"). The Federal Circuit's subsequent decision in *Ammex II* conflicts with *Neal* and Federal Circuit precedent, *Banker's Trust New York Corp. v. United States*, 225 F.3d 1368, 1375 (Fed Cir. 2000) (prior judicial construction is binding on federal agencies because of the "relationship of the Judiciary to Congress and the ability of Congress to change its statutes to correct a misintrerpretation by the Court"), by permitting Customs to re-construe those statutes and to revoke authorization of Ammex's duty-free motor fuel sales. *See also, Marbury v. Madison,* 5 U.S. (1 Cranch) 137, 176 (1803) ("It is, emphatically, the province and duty of the judicial department, to say what the law is"); *Brand X Internet Services v. F.C.C.*, 345 F.3d 1120, 1131 (9th Cir. 2003) (*Neal* applies to Federal Circuit Courts of Appeal); *Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 312-13 (1994) ("[J]udicial construction of a statute is an authoritative statement of what the statute meant before as well as after the decision of the case giving rise to that construction"); *accord United States v. Mead Corp.*, 533 U.S. 218, 248-49 (2001) (Scalia, J., dissenting) ("I know of no case, in the entire history of the federal courts, in which we have allowed a judicial interpretation of a statute to be set aside by an agency--or have allowed a lower court to render an interpretation of a statute subject to correction by an agency"); *Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 113 (1948) ("Judgments within the powers vested in courts by the Judiciary Article of the Constitution may not lawfully be revised, overturned or refused faith and credit by another Department of Government."); *Commodities Export Co. v. United States Customs Service*, 957 F.2d 223, 225-27 (6th Cir. 1992) (recognizing CIT as an Article III court).

The Federal Circuit Opinion, upholding Customs' re-interpretation of the OTCA to preclude duty-free motor fuel sales, implicates the same compelling and important Separation of Powers considerations underlying *Neal*. *See also Banker's Trust*, 225 F.3d at 1376 (Executive agency regulation could not effectively construe a statute in a manner different from a prior definitive court ruling).

III. DENYING *RES JUDICATA* EFFECT TO THE *AMMEX I* STATUTORY CONSTRUCTION ON THE GROUND THAT THE APPLICATION OF I.R.C. § 4081 WAS A NEW FACT, CONFLICTS WITH AND UNDERMINES IMPORTANT *RES JUDICATA* DECISIONS.

The Opinion conflicts with *res judicata* principles, which this Court has long recognized are "essential to the maintenance of social order; for, the aid of judicial tribunals would not be invoked for the vindication of rights of person and property, if conclusiveness did not attend the judgments of such tribunals." *Nevada v. United States*, 463 U.S. 110, 129 (1983); *see also Federated Dept. Stores, Inc. v. Moitie*, 452 U.S. 394, 401 (1981) (*res judicata* serves "vital public interests" "that there be an end to litigation—a maxim which comports with common sense as well as public policy").

Ammex I expressly and unqualifiedly decided that Ammex was entitled to sell motor fuel as "duty-free" merchandise under the OTCA. *Ammex I*, at 1276 ("19 U.S.C. §§ 1555 and 1557 allow the duty-free sale of gasoline and diesel fuel from a duty-free enterprise."). (App., *infra*, 42a.) "*Res judicata* prevents litigation of all grounds for, or defenses to, recovery that were previously available to the parties, regardless of whether they were asserted or determined in the prior proceeding." *Brown v. Felsen*, 442 U.S. 127, 131 (1979); *Nevada*, 463 U.S. at 129-30; *Chicot County Drainage Dist. v. Baxter State Bank*, 308 U.S. 371, 378 (1940). *Res judicata* bars defenses not brought in the first suit, regardless of the legal theory. *Cromwell v. County of Sac*, 94 U.S. 351, 352-53 (1877) ("If such defences were not presented in the action . . . the subsequent allegation of their existence is of no legal consequence").[2]

Thus, a party is "not at liberty to prosecute [its] right by piecemeal, as by presenting a part only of the available grounds and reserving others for another suit, if failing in that." *Grubb v. Public Utilities Comm'n*, 281 U.S. 470, 478 (1930); *Werlein v. New Orleans*, 177 U.S. 390, 397 (1900); *United States v. California & Oregon Land Co.*, 192 U.S. 355, 358 (1904). *Res judicata* applies in a subsequent suit where the parties and subject-matter are the same, not only as to matters actually presented to sustain or defeat the right asserted, but also as to any other available matter which might have been presented to that end. *Cromwell*, 94 U.S. at 352 (1876); *and see*, Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction 2d § 4406 (under claim/defense preclusion, "[i]f the plaintiff wins . . . the defendant cannot avoid the judgment by offering new defenses").

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[2] *Res judicata* is binding on the United States and federal agencies. *Nevada*, 463 U.S. at 135; *United States v. Mendoza*, 464 U.S. 154, 161 (1984); *United States v. Stauffer Chemical Co.*, 464 U.S. 165, 174 (1984); *Astoria Federal Savings & Loan Ass'n v. Solimino*, 501 U.S. 104, 107-108 (1991).

A. The Opinion Conflicts With Precedent by Concluding That *Ammex I* And *Ammex II* Did Not Arise From A Common Nucleus Of Operative Facts.

A party asserting *res judicata* must prove that (1) the parties are identical or in privity; (2) the first suit proceeded to a final judgment on the merits; and (3) the second claim is based on the same set of transactional facts as the first. *Jet, Inc. v. Sewage Aeration Sys.*, 223 F.3d 1360, 1362 (Fed. Cir. 2000). So it was here.

The Federal Circuit Opinion correctly found that the first two elements of *res judicata* [were] present because the parties (Ammex and the government) are identical in both actions, and the prior litigation resulted in a valid final judgment on the merits. Thus, the sole issue was whether *Ammex I* and *Ammex II* arose from a common nucleus of operative fact. Opinion, 334 F.3d at 1056. (App., *infra*, 6a-7a.) In deciding that they did not, the Opinion departed from this Court's *res judicata* precedent. *Grubb*, 281 U.S. at 478; *Werlein*, 177 U.S. at 397; *California & Oregon Land Co.*, 192 U. S. at 358; *Brown*, 442 U.S. at 131; *Nevada*, 463 U.S. at 129-30; *Chicot County Drainage Dist*, 308 U.S. at 378; *Cromwell*, 94 U.S. at 352-53.

Specifically, the Federal Circuit held that the cases lacked a common nucleus of operative fact on the ground that a prior existing law and legal theory was a "new fact":

> the application of federal taxes to gasoline and diesel fuel, preempting such fuel from qualifying as "duty-free merchandise," is a new fact which was not a part of *Ammex I*. . . .

Opinion, 334 F.3d at 1057. (App., *infra*, 9a.)

This Court's *res judicata* jurisprudence does not permit such a transparent creation of new nucleus of facts based on nothing more than a different agency rationale. *Brown*, 442 U.S. at 131; *Nevada*, 463 U.S. at 129-30; *Chicot County Drainage Dist*, 308 U.S. at 378; *Cromwell*, 94 U.S. at 352-53. *Ammex I* and *Ammex II* share a common origin. Before *Ammex I*, Customs had for years authorized Ammex's duty-free sales, but excluded motor fuel. In 1998, HQ 227385 affirmed the 1994 HQ 225287 finding that "duty-free gasoline and diesel fuel for automobiles may not be sold . . . at a duty-free store provided for in 19 U.S.C. 1555(b)." (App., *infra*, 51a, 65a.) *Ammex I* set aside Customs' rulings and "DECREED that 19 U.S.C. §§ 1555 and 1557 allow the duty-free sale of gasoline and diesel fuel from a duty-free enterprise." *Id.* at 1276. (App., *infra*, 42a.) *Ammex I* thus construed the same OTCA provisions upon which Customs based its Revocation. Customs did not appeal *Ammex I*. Instead, on September 5, 2000, Customs authorized Ammex's duty-free motor fuel sales. (App., *infra*, 103a.)

The entire point of *Ammex I* was to resolve the question of whether Ammex could sell motor fuel from its duty-free sales enterprise. *Ammex I* was both a convenient and the expected litigation in which to determine the effect, if any, of any federal law including I.R.C. § 4081, on Ammex's duty-free motor fuel sales under 19 U.S.C. §§ 1555 and 1557. Indeed, Customs acknowledged that "the real savings would be the exemption from federal and state excise taxes." HQ225287 at 2. (App., *infra*, 46a.) The result was the CIT judgment that "19 U.S.C. §§ 1555 and 1557 allow the duty-free sale of gasoline and diesel fuel from a duty-free enterprise." *Ammex I* at 1276. (App., *infra*, 42a.)

Ammex II ensued because Customs attempted to avoid *Ammex I* by Revocation of the letter ruling issued in compliance with *Ammex I*. Customs' Revocation cited no factual changes whatever in Ammex's duty-free motor fuel operation. (App., *infra*, 101a.) No new record, fact investigation or fact-finding was involved. Rather, Customs simply asserted a new legal theory—"that fuel which is assessed a tax under 26 U.S.C 4081 cannot qualify for entry under 19 U.S.C. 1555(b)(1)."[3] (App., *infra*, 106a) Thus, *Ammex I* and *II* share a common *factual* origin and also involve the "same claim." *See Nevada*, 463 U.S. at 131 (holding that *res judicata* barred second suit where the Government intended to litigate all the rights at issue in first suit).

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[3] It should be noted that Ammex has, under the Export Clause, consistently challenged whether § 4081 fuel excise tax was constitutionally imposed on its purchases of motor fuel for export. U.S. Const. art. I § 9, cl. 5.

B. The Opinion Conflicted with Precedent by Confusing Old Law With New Facts.

The Opinion's holding that the application of I.R.C. § 4081 to 19 U.S.C. § 1555 is a new *fact* conflicts with *res judicata* precedent. First, § 4081 and 19 U.S.C. § 1555 are old law. I.R.C. § 4081, although amended from time to time, is a decades-old excise tax law in effect during the entire period in suit in *Ammex I.* Pub. L. 86-342. 19 U.S.C. § 1555(b)(8)(E) had been in effect since 1988. Pub. L. 100-418. As noted above, Customs was aware that the *Ammex I* proceeding was not a mere intellectual exercise, and duty-free status was being pursued to immunize the fuel from the I.R.C. § 4081 motor fuel excise tax. (App., *infra*, 46a.) Customs' new rationale that I.R.C. § 4081 applied did not change the *operative facts* in any respect.

In *Ammex I*, Ammex had successfully litigated its right to sell motor fuel from its duty-free sales enterprise under 19 U.S.C. §§ 1555 and 1557. Customs' Revocation simply proffered a newly minted argument based on prior law to avoid the *Ammex I* holding. (App., *infra*, 101a.) *Res judicata* bars the Government from asserting in a second proceeding a different legal argument under § 4081 because § 4081 is *law*, which the Government could have raised in *Ammex I. Cromwell*, 94 U.S. at 352-353; *Chicot*, 308 U.S. at 378; *Grubb*, 281 U.S. at 478-79; *see also* Fed. R. Civ. P. 8(c). Moreover, the I.R.C. § 4081 tax was the primary federal tax that duty-free status would exempt the fuel from. There was no other federal tax. Thus, the Opinion conflicts with years of *res judicata* jurisprudence by holding that a new legal theory based on a tax statute in effect during the first suit may be considered a new fact in order to avoid *res judicata*. The Opinion thus threatens finality and improperly permits a federal agency to litigate by piecemeal the meaning of the statute already construed by an Article III court. *Grubb*, 281 U.S. at 478.

CONCLUSION

Therefore, Petitioner respectfully requests that this Court grant this petition for writ of certiorari, reverse the decisions of the United States Court of Appeals for the Federal Circuit and the Court of International Trade, and hold that the decision in *Ammex I* binds Customs and precludes Customs from re-litigating the issue of whether the OTCA authorizes Ammex to sell tax and duty-free motor fuel from its duty-free sales enterprise.

Respectfully Submitted,

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(Any footnotes trail the end of each document)

02-1498

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

AMMEX, INC.,
Plaintiff-Appellant,

v.

UNITED STATES,
Defendant-Appellee.

July 1, 2003, Decided

COUNSEL: Craig L. John, Dykema Gossett PLLC, of Bloomfield Hills, Michigan, argued for plaintiff-appellant. On the brief were Herbert C. Shelley, J. William Koegel, Jr., Alice A. Kipel, and Troy H. Cribb.

Amy M. Rubin, Attorney, Civil Division, Commercial Litigation Branch, International Trade Field Office, Department of Justice, of New York, New York, argued for defendant-appellee. With her on the brief were Robert D. McCallum, Jr., Assistant Attorney General; David M. Cohen, Director, Civil Division, Commercial Litigation Branch, Department of Justice, of Washington, DC; and John J. Mahon, Acting Attorney in Charge, International Trade Field Office. Of counsel was Beth C. Brotman, Attorney, Office of Assistant Chief Counsel, United States Customs Service, New York, New York.

JUDGES: Before MAYER, Chief Judge, NEWMAN, and GAJARSA, Circuit Judges.

OPINIONBY: GAJARSA

OPINION: GAJARSA, Circuit Judge.

Ammex, Inc. ("Ammex") appeals the final decision of the United States Court of International Trade denying its Motion for an Order to Show Cause Why the United States Customs Service Should Not be Held in Contempt. Ammex v. United States, 193 F. Supp. 2d 1325 (Ct. Int'l Trade 2002) ("Ammex II"). Because res judicata does not preclude the United States Customs Service ("Customs") from revoking its approval of the sale of gasoline and diesel fuel on a duty- and tax-free basis, we affirm.

I. BACKGROUND

Ammex operates a "sterile" U.S. Customs Class 9 bonded warehouse, commonly known as a duty-free store or duty-free sales enterprise, from which it seeks to sell gasoline and diesel fuel on a duty- and tax-free basis. The designation "sterile" indicates that the physical design and operation of the facility guarantees the exportation of products sold therein. The store is located on West Lafayette Street in Detroit, Michigan, adjacent to the Ambassador Bridge connecting the United States and Canada. Customers entering Ammex's facility have necessarily proceeded beyond the "point of no return," having exited from the United States. As a duty- and tax-free sales enterprise, Ammex is permitted to sell for export certain goods "duty-free" to customers who transport those goods directly to Canada after leaving Ammex's store.

In a letter dated January 24, 1994, Ammex requested approval to sell gasoline and diesel fuel on a duty- and tax-free basis. On February 12, 1998, Customs denied Ammex's request because gasoline and diesel fuel are "unidentifiable fungibles." U.S. Customs Service Headquarters Ruling ("HQ") 227385 (Feb. 12, 1998). HQ 227385 reaffirmed a 1994 HQ ruling which found that activities of duty-free stores should not be extended to cover "unidentifiable fungibles," such as gasoline and diesel fuel, when sold on a retail basis. HQ 225287, 1994 WL 830665 (June 7, 1994). "In both HQ 227385 and 225287, Customs accepted the requestor's assertion that the merchandise under consideration was duty-free but . . . determined that such merchandise could not be sold as duty-free merchandise from a class 9 bonded warehouse." Customs Bulletin and Decisions, Vol. 35, No. 25, 295, 296 (June 1, 2001).

In Ammex, Inc. v. United States, 116 F. Supp. 2d 1269 (Ct. Int'l Trade 2000) ("Ammex I"), Ammex challenged the above HQ rulings. The Court of International Trade found that "Customs acted unlawfully in prohibiting Ammex from selling duty-free gasoline and diesel fuel." Id. at 1275-76. The Court of International Trade held that Customs's decision to prohibit Ammex from selling duty-free gasoline and diesel fuel violated 19 U.S.C. § 1557(a)(1), which allows "any merchandise subject to duty, with the exception of perishable articles and explosive substances" to be entered and withdrawn for exportation from bonded warehouses such as Ammex's duty-free store. Id. The Court of International Trade accordingly entered a judgment setting aside HQ

227385 and "ORDERED ADJUDGED AND DECREED that 19 U.S.C. §§ 1555 and 1557 allow the duty-free sale of gasoline and diesel fuel from a duty-free enterprise." Id. at 1276.

On September 5, 2000, in accordance with the Court of International Trade's decision, Customs issued a letter ("September 5 letter") to Ammex granting its request to expand its "Class 9 duty[-]free warehouse operation to include the gasoline and diesel fuel tanks located at [Ammex's] facility."

On October 23, 2000, Ammex wrote to Customs seeking a letter to certify that the fuel sold at Ammex's duty-free store was exempt from taxes. Customs forwarded Ammex's request to the Internal Revenue Service ("IRS"). On January 8, 2001, the IRS issued an informational letter stating that 26 U.S.C. § 4081 of the Internal Revenue Code imposes a tax on the entry into the United States of any taxable fuel, including gasoline and diesel fuel for consumption, use, or warehousing.

Based on the IRS letter, Customs determined that it could not lawfully permit Ammex to sell gasoline and diesel fuel on a duty- and tax-free basis. On June 1, 2001, Customs issued a notice proposing to revoke the September 5 letter. Customs Bulletin and Decisions, Vol. 35, No. 25, at 295 ("Proposed Revocation of Letter Relating to Gasoline and Diesel Fuel From a Class 9 Customs Bonded Warehouse Also Known as a Duty-free Shop"). On November 21, 2001, after a notice and comment period, Customs revoked its approval of the sale of gasoline and diesel fuel on a duty- and tax-free basis, effective on January 21, 2002. Customs Bulletin and Decisions, Vol. 35, No. 47, 5 (Nov. 7, 2001)

("Revocation of Ruling Letter and Treatment Relating to Gasoline and Diesel Fuel in a Class 9 Customs Bonded Warehouse").

Subsequently, Ammex filed suit in the Court of International Trade to bar Customs's revocation under the doctrine of res judicata and to hold Customs in contempt for violating Ammex I. The Court of International Trade denied Ammex's motion to enjoin Customs from revoking Ammex's permission to sell gasoline and diesel fuel on a duty- and tax-free basis and to hold Customs in contempt for violating the court's judgment in Ammex I. Ammex timely appealed, and we have jurisdiction pursuant to 28 U.S.C. § 1295(a)(5).

II. DISCUSSION

A. Standard of Review

Whether, based on the facts of the case, a claim is barred by res judicata is a question of law that we review de novo. Faust v. United States, 101 F.3d 675, 677 (Fed. Cir. 1996). We review the denial of a motion to hold Customs in contempt for an abuse of discretion. United States v. Hanover Ins. Co., 82 F.3d 1052, 1056 (Fed. Cir. 1996).

B. Res Judicata

This case presents the question of whether res judicata precludes Customs from revoking its approval of the sale of gasoline and diesel fuel on a duty- and tax-free basis.

Under the doctrine of res judicata (or claim preclusion), "[a] final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action." Federated Dep't Stores, Inc. v. Moitie, 452 U.S. 394, 398, 69 L. Ed. 2d 103, 101 S. Ct. 2424 (1981); see also Young Eng'rs, Inc. v. United States Int'l Trade Comm'n, 721 F.2d 1305, 1314 (Fed. Cir. 1983) (stating that this court would adopt the transactional approach advocated by the Restatement (Second) of Judgments); Restatement (Second) of Judgments § 18 (1982). Over the years, the doctrine has come to incorporate common law concepts of merger and bar, and will thus also bar a second suit raising claims based on the same set of transactional facts. Migra v. Warren City School Dist. Bd. of Educ., 465 U.S. 75, 77 n.1, 79 L. Ed. 2d 56, 104 S. Ct. 892 (1984) ("Claim preclusion refers to the effect of a judgment in foreclosing litigation of a matter that never has been litigated, because of a determination that it should have been advanced in an earlier suit. Claim preclusion therefore encompasses the law of merger and bar."). Accordingly, to prevail on a claim of res judicata, the party asserting the bar must prove that (1) the parties are identical or in privity; (2) the first suit proceeded to a final judgment on the merits; and (3) the second claim is based on the same set of transactional facts as the first. Parklane Hosiery Co. v. Shore, 439 U.S. 322, 326 n.5, 58 L. Ed. 2d 552, 99 S. Ct. 645 (1979); Jet, Inc. v. Sewage Aeration Sys., 223 F.3d 1360, 1362 (Fed. Cir. 2000).

It is undisputed that the first two elements are present: The parties (Ammex and the government) are identical in both actions, and the prior litigation resulted in a valid final judgment on the merits. Thus, the case reduces to an analysis of the transactional facts involved in the two causes of action. See Young Eng'rs, 721 F.2d at 1314 (noting that this court is broadly guided by the Restatement (Second) of Judgments); Restatement (Second) of Judgments § 24 (defining "claim" as encompassing rights and remedies arising out of the same set of transactional facts).

The Restatement notes that a common set of transactional facts is to be identified "pragmatically." Restatement (Second) of Judgments § 24. Seeking to bring additional clarity to this standard, courts have defined "transaction" in terms of a "core of operative facts," the "same operative facts," or the "same nucleus of operative facts," and "based on the same, or nearly the same factual allegations." Herrmann v. Cencom Cable Assocs., Inc., 999 F.2d 223, 226 (7th Cir. 1993) (citing Parsons Steel, Inc. v. First Ala. Bank, 474 U.S. 518, 521, 88 L. Ed. 2d 877, 106 S. Ct. 768 (1986)); see also Nevada v. United States, 463 U.S. 110, 128-30, 77 L. Ed. 2d 509, 103 S. Ct. 2906 (1983) (requiring courts to first determine whether the "same cause of action" is being sued upon); Lawlor v. Nat'l Screen Serv. Corp., 349 U.S. 322, 326, 99 L. Ed. 1122, 75 S. Ct. 865 (1955) ("[A] prior judgment is res judicata only as to suits involving the same cause of action."); United States v. Haytian Republic, 154 U.S. 118, 125, 38 L. Ed. 930, 14 S. Ct. 992 (1894) ("One of the tests laid down for the purpose of determining whether or not the causes of action should have been joined in one suit is whether the evidence necessary to prove one cause of action would establish the other."). In the instant case, we must determine whether, for purposes of claim preclusion, HQ 227385, which Customs provided for denying Ammex's request to sell gasoline and diesel fuel duty-free and the Court of International Trade held was contrary to law, Ammex I, 116 F. Supp. 2d at 1270, is based on the same set of factual allegations as whether the application of federal taxes to gasoline and diesel fuel preempts such fuel from qualifying as "duty-free merchandise," Ammex II, 193 F. Supp. 2d at 1330.

We hold that it is not. The government correctly argues that, although the ultimate effect of both claims was to determine whether Ammex may sell gasoline and diesel fuel duty-free, the claims are sufficiently different because in the prior lawsuit, Ammex claimed, upon the administrative record, that Customs's interpretation of 19 U.S.C. § 1557(a)(1) was not in accordance with law, and the current claim is whether the IRS's determination that Ammex's fuel must be taxed under 26 U.S.C. § 4081 precludes it from qualifying as "duty-free merchandise" under 19 U.S.C. § 1555(b)(8)(D).

The Omnibus Trade and Competitiveness Act of 1988 defines "duty-free enterprise" as:A person that sells, for use outside the customs territory, duty-free merchandise that is delivered from a bonded warehouse to an . . . exit point for exportation by, or on behalf of, individuals departing from the customs territory.19 U.S.C. § 1555(b)(8)(D)(2000). "Duty-free merchandise" is defined as goods on which no federal duty or tax has been charged "pending exportation from the customs territory." Id. § 1555(b)(8)(E). Logic dictates that the term "duty-free" is somewhat of a misnomer and more accurately should be termed "duty- and tax-free." Thus, the unique nature of a duty- and tax-free store is that it sells goods for immediate export from the United States so that its customers need not pay federal duties and taxes on the goods.

Ammex concedes that Ammex I did not expressly adjudicate the tax issue. Ammex nevertheless argues that the tax question appeared in the administrative record in Ammex I and could have been litigated in Ammex I. We conclude that the Court of International Trade properly rejected Ammex's argument. Ammex points only to excerpts dealing with forwarding warehouse entry documents to the IRS, and not the question of whether federal tax was due on the gasoline and diesel fuel. Moreover, Ammex raised the specific tax issue with Customs after the conclusion of Ammex I. In response to a request from Ammex, the IRS issued an informational letter stating that 26 U.S.C. § 4081 imposes a tax on the entry into the United States of any taxable fuel, including gasoline and diesel fuel for consumption, use, or warehousing. Ammex argues that a court's statutory interpretation cannot be challenged in a subsequent agency decision. The factual premise of the lawsuit in Ammex II, however, differs from the prior one because the application of federal taxes to gasoline and diesel fuel, preempting such fuel from qualifying as "duty-free merchandise," is a new fact which was not a part of Ammex I. Cf. United States v. Stone & Downer Co., 274 U.S. 225, 235-36, 71 L. Ed. 1013, 47 S. Ct. 616, Treas. Dec. 42211 (1927) (holding that in customs classification cases a determination of fact or law with respect to one importation is not res judicata as to another importation of the same merchandise by the same parties). Because under the relevant statute, the term "duty-free merchandise" means "merchandise sold by a duty-free sales enterprise on which neither Federal duty nor Federal tax has been assessed pending exportation from the customs territory," 19 U.S.C. § 1555(b)(8)(E), we reject Ammex's argument that the legal claims in the two suits arise from the same "operative nucleus of fact." See, e.g., Herrmann, 999 F.2d at 226; Restatement (Second) of Judgments § 24 cmt. f ("Material operative facts occurring after the decision of an action with respect to the same subject matter may in themselves, or taken in conjunction with the antecedent facts, comprise a transaction which may be made the basis of a second action not precluded by the first."); see also Lawlor, 349 U.S. at 327-28 (stating prior dismissal of antitrust complaint did not bar new antitrust complaint based on conduct occurring after the first judgment).

Next, Ammex correctly argues that the Court of International Trade erred in its initial decision by applying the elements of collateral estoppel (or issue preclusion) instead of those of res judicata. In denying Ammex's contempt motion, the Court of International Trade applied the elements of collateral estoppel and recognized the distinction between the issue raised in Ammex I, 116 F. Supp. 2d at 1270 (stating that the specific decisions and rationale contained in HQ 227385 were arbitrary, capricious, or contrary to law), and the separate and distinct issue on which Ammex challenged Customs's revocation of the September 5 letter in Ammex II, 193 F. Supp. 2d at 1330 (stating that the gasoline and diesel fuel sold at Ammex's duty-free store is subject to federal tax and that such fuel does not satisfy the statutory definition of "duty-free merchandise"). Nevertheless, the government correctly asserts that this was not prejudicial error, because the Court of International Trade addressed Ammex's argument in denying its motion for reconsideration, Ammex, Inc. v. United States, 201 F. Supp. 2d 1374 (Ct. Int'l Trade 2002), and, as discussed above, under this court's de novo review, res judicata does not preclude

Customs from revoking its approval of the sale of gasoline and diesel fuel on a duty- and tax-free basis.

C. Motion for an Order to Show Cause Why the United States Customs Service Should Not be Held in Contempt

Finally, Ammex suggests that the Court of International Trade abused its discretion in denying its motion to hold Customs in contempt for revoking Ammex's duty- and tax-free status for gasoline and diesel fuel. We reject this argument because the Court of International Trade may hold a party in contempt if it determines that its actions constitute a willful obstruction of justice, and we shall sustain a denial of contempt based upon a reasoned legal position for failure to abide by the court's judgment. Here, the Court of International Trade did not abuse its discretion in denying Ammex's motion to hold Customs in contempt because the position of the IRS on the tax issue provided a reasonable basis for Customs's action. In short, an agency may change its policy position based on a reasonable explanation, and the IRS ruling provided such a basis.

IV. CONCLUSION

Because res judicata does not preclude Customs from revoking its approval of the sale of gasoline and diesel fuel on a duty- and tax-free basis, the judgment of the Court of International Trade denying Ammex's Motion for an Order to Show Cause Why the United States Customs Service Should Not be Held in Contempt is

AFFIRMED.

Court No.: 99-01-00013

UNITED STATES COURT OF
INTERNATIONAL TRADE

AMMEX, INC.,
Plaintiff,

v.

UNITED STATES OF AMERICA,
Defendant.

February 22, 2002, Decided

COUNSEL: Steptoe & Johnson LLP (Herbert C. Shelley, Alice A. Kipel), for Plaintiff.

Robert D. McCallum, Jr., Assistant Attorney General; Joseph I. Liebman, Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, United States Department of Justice (Amy M. Rubin), for Defendant.

JUDGES: Evan J. Wallach, Judge.

OPINIONBY: Evan J. Wallach

OPINION:

I

PRELIMINARY STATEMENT

Plaintiff, Ammex, Inc. ("Ammex"), moves this court for an Order to Show Cause Why Defendant Should Not be Held in Contempt, pursuant to Rules 7(e) and 63 of the Rules of this Court. Specifically, Ammex seeks to require defendant, the United States of America (the "Government"), to explain why Customs' revocation of Ammex's authorization to sell duty-free fuel is not in contempt of this court's order and judgment of August 25, 2000. Ammex, Inc.'s Motion for Order to Show Cause Why Defendant Should Not be Held in Contempt ("Ammex's Motion") at 1. Familiarity with the court's August 25, 2000 order and decision in Ammex, Inc. v. United States, 116 F. Supp. 2d 1269 (CIT 2000) ("Ammex I"), is presumed._

II

BACKGROUND

Ammex operates a duty-free store at the Ambassador Bridge between Detroit, Michigan and Windsor, Canada. In a letter dated January 24, 1994, Ammex requested approval to sell gasoline and diesel fuel on a duty-free basis. Letter from Barbeau to Morandini of 1/24/94 (Ex. 6 to Ammex's Memorandum of Law in Support of Ammex, Inc.'s Motion for Order to Show Cause Why Defendant Should Not be Held in Contempt ("Ammex's Memo")). On February 12, 1998, the United States Customs Service ("Customs") ruled that gasoline and diesel fuel could not be sold on a duty-free basis from Ammex's facility. U.S. Customs Service Headquarters Ruling ("HQ") 227385, February 12, 1998. This ruling reaffirmed a 1994 headquarters ruling which found that activities of duty-free stores should not be extended to cover "unidentifiable fungibles," such as gasoline and diesel fuel, when sold on a retail basis. HQ 225287, June 7, 1994. "In both HQ 227385 and 225287, Customs accepted the requestor's assertion that the merchandise under consideration was duty-free but, . . . determined that such merchandise could not be sold as duty-free merchandise from a class 9 bonded warehouse." Customs Bulletin and Decisions, Vol. 35, No. 25, June 20, 2001, at 296.

In Ammex I, Ammex challenged the above Customs rulings. This court found that "Customs acted unlawfully in prohibiting Ammex from selling duty-free gasoline and diesel fuel." Ammex I, 116 F. Supp. 2d at 1275-76. This court accordingly entered a judgment setting aside HQ 227385 and "ORDERED ADJUDGED AND DECREED that 19 U.S.C. § § 1555 and 1557 allow the duty-free sale of gasoline and diesel fuel from a duty-free enterprise." Id. at 1276.

On September 5, 2000, in accordance with the court's decision, Customs issued a letter to Ammex granting its request to expand its "Class 9 duty free warehouse operation to include the gasoline and diesel fuel tanks located at [Ammex's] facility." Letter from Ryan to Levesque of 9/5/00 (Ex. 2 to Ammex's Memo) ("September 5 letter").

On October 23, 2002, Ammex wrote to Customs seeking a letter to certify that the fuel sold at Ammex's duty-free store was exempt from taxes. Letter from Levesque to Ryan of 10/23/00 (Ex. 1 to "Durant Declaration" of Defendant's Opposition to Plaintiff's Motion to Show Cause Why Defendant Should Not be Held in Contempt) ("October 23 letter"). Customs forwarded Ammex's request to the Internal Revenue

Service ("IRS"). On January 8, 2001, the IRS issued an informational letter stating that section 4081 of the Internal Revenue Code (the "Tax Code") (26 U.S.C. § 4081) imposes a tax on the entry into the United States of any taxable fuel, including gasoline and diesel fuel for consumption, use, or warehousing. Durant Declaration P8.

Based on the IRS letter, Customs determined that it could not lawfully permit Ammex to sell gasoline and diesel fuel duty-free. On June 20, 2001, Customs issued a notice proposing to revoke the September 5 letter. Customs Bulletin and Decisions, Vol. 35, No. 25, June 20, 2001. On November 21, 2001, after a notice and comment period, Customs advised that it was "revoking a ruling letter pertaining to gasoline and diesel fuel from a [sic] class 9 bonded warehouses and revoking any treatment previously accorded by the Customs Service to substantially identical transactions." Id., Vol. 35, No. 47 (November 21, 2001) at 5 ("Revocation Decision"). Customs announced that the revocation would become effective on January 21, 2002. Id. Ammex thereafter filed its Motion to Show Cause Why Defendant Should Not be Held in Contempt.

III

STANDARD

To establish that a party is liable for civil contempt a plaintiff must prove three elements: "(1) that a valid order of the court existed; (2) that the defendants had knowledge of the order; and (3) that the defendants disobeyed the order." Roe v. Operation Rescue, 54 F.3d 133, 137 (3d Cir. 1995). Civil contempt must be proven by clear and convincing evidence, Glaxo, Inc. v. Novopharm, Ltd., 110 F.3d 1562, 1572 (Fed. Cir. 1997), and a court cannot hold a party in contempt if there is a "fair ground of doubt as to the wrongfulness of the [party's] actions," Preemption Devices, Inc. v. Minn. Mining & Mfg. Co., 803 F.2d 1170, 1173 (Fed. Cir. 1986).

IV

ARGUMENTS

Ammex argues that Customs' revocation is "plainly inconsistent with this Court's Order permitting the sale of duty-free gasoline and diesel fuel from a duty-free sales enterprise." Ammex's Memo at 3. Ammex requests, among other things, that this court issue an order to show cause why Customs' revocation is not in contempt of this court's judgment of August 25, 2000 and determine that section 4081 of the Tax Code, as it applies to entries into Class 9 bonded warehouses, is unconstitutional.

"The agency decision challenged in Ammex I was based exclusively on a perceived 'unidentifiable fungibles' exception to the statute relating to bonded warehouses, particularly Class 9 bonded warehouses, and the holding in Ammex I was simply that that decision, as memorialized in HQ 225287 and affirmed in HQ 227385, was contrary to law." Defendant's Opposition to Plaintiff's Motion for an Order to Show Cause Why Defendant Should not be Held in Contempt ("Defendant's Opposition") at 8. The Government argues, "Neither the challenged ruling letters nor this Court's holding addressed or involved any other potential basis for prohibiting the duty-free sale of gasoline and diesel fuel, including whether the fuel which Ammex intended to sell is encompassed by the statutory definition of 'duty-free merchandise.'" Id. Because the issues presently raised by Ammex's motion "are not relevant to a determination of whether Customs' revocation decision violates the Ammex I decision," id. at 17, the Government argues that this court should decline to consider them.

V

ANALYSIS

A

Jurisdiction to Entertain Present Challenge

The United States Court of International Trade, like all Federal courts established under Article III of the Constitution, is a court of limited jurisdiction. United States v. Gold Mountain Coffee, Ltd., 8 C.I.T. 247, 248, 597 F. Supp. 510, 513 (1984). The party asserting jurisdiction "has the burden of proving that jurisdiction in this court is proper." Id. at 249. Jurisdiction for this court to entertain the challenge in Ammex I fell under 28 U.S.C. § 1581(i), which provides the court with jurisdiction over "any civil action commenced against the United States . . . that arises out of any law of the United States providing for revenue from imports or tonnage, tariffs, duties, fees, or other taxes on the importation of merchandise for reasons other than the raising of revenue or administration and enforcement with respect to these matters." 28 U.S.C. § 1581(i). Ammex now argues that this court "possesses jurisdiction to hear this motion by virtue of the Court's jurisdiction over the underlying proceeding in this case." Plaintiff's Memo at 3 (citing United States v. Hanover Ins. Co., 82 F.3d 1052, 1054 (Fed. Cir. 1996) ("The Court of International Trade has the inherent power to determine the effect of its judgments and issue injunctions to protect against attempts to attack or evade those judgments.")).

Were Customs' revocation an attempt to attack or evade Ammex I and the court's August 25, 2000 judgment, then no doubt this court could readily exercise jurisdiction over such behavior under its inherent enforcement powers and as an extension of its jurisdiction to hear Ammex's original complaint in Ammex I. However, the issue underlying Ammex's Complaint in the present motion is distinct from the issue raised in Ammex I. While both issues call upon the court to determine the validity of Customs' refusal to allow Ammex to sell fuel from its duty-free store, the stated bases for Customs' refusal to allow Ammex's sales differ in each case.

Ammex's contention that "there can be no dispute that the transaction and matter at issue in this second action are the same as the first--the matter now, as before, is Ammex's right to sell gasoline and diesel fuel duty-free from its duty-free store in Detroit, Michigan," Plaintiff's Memo at 16, is specious. Ammex states the issue too broadly. The issue in Ammex I was not simply whether Ammex is entitled "to sell gasoline and diesel fuel from its duty-free store in Detroit, Michigan." Id. Rather, the court was called upon to consider whether the explanation Customs provided for denying Ammex's request to sell gasoline and diesel fuel duty-free was arbitrary, capricious, or contrary to law.

The Government more accurately states the case thus:

> The only issue that the Court had to decide in [Ammex I] was whether the denial of Ammex's proposal to sell gasoline and diesel fuel free of duty at its duty-free store in Detroit, Michigan, for the reasons provided in HQ 225287 and then affirmed in HQ 227385, was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. Based on the nature of the complaint, the Court was constrained to consider only that stated basis for the challenged decision and review only the agency's record underlying its decision."

Defendant's Opposition at 4 (emphasis added).

This court accordingly reviewed Customs' stated reason for denying Ammex's request to sell duty-free fuel, namely, its rationale that such fuel falls under an "unidentifiable fungibles" exception to merchandise that can lawfully be entered and withdrawn for exportation from duty-free stores. Customs reasoned that, because duty-free merchandise purchased in the United States, if reimported, had to be declared and the duties and taxes paid, the lack of any practical means of enforcing this requirement with respect to unidentifiable fuel in gas tanks rendered the sale of duty-free fuel contrary to law.

In resolving the issue raised in Ammex I, the court stated, "§ 1557(a)(1) is dispositive of Plaintiff's claim." Ammex I, 116 F. Supp. 2d at 1275. "On its face, the plain language of § 1557(a)(1) shows Congress' intent that there be only two restrictions on the type of dutiable merchandise that may be stored or withdrawn from a bonded warehouse: (1) perishable articles and (2) explosive substances other than firecrackers." Id. at 1273. This court determined that diesel fuel and gasoline did not fall within either of these exceptions, and thus it was error for the government to read into the governing statute "an exception beyond those specifically stated in § 1557(a)(1)." Id. at 1275. "In view of 1557(a)(1)'s instruction that 'any merchandise subject to duty' may be entered and withdrawn from a bonded warehouse, the court finds that Customs violated this provision in promulgating HQ 227385." Id.

Implicit in both parties' briefings in Ammex I and the court's opinion was the presumption that the gasoline and diesel fuel at issue qualified as "duty-free merchandise" within the meaning of 19 U.S.C. § 1555(b)(8)(E). Neither party questioned this assumption, and because neither party raised a challenge, the court did not consider or rule on such an issue. Because of subsequent events, however, the issue has arisen as to whether gasoline and diesel fuel can qualify as "duty-free merchandise" under 19 U.S.C. § 1555(b)(8)(E), in light of information from the IRS that such fuel may be subject to tax and therefore unable to qualify as "duty-free merchandise" under the statutory definition.

"For the Court to consider Ammex's Motion, it must also consider whether the federal excise tax issue now framed by Customs was directly or indirectly part and parcel of Ammex I." Reply of Ammex, Inc. In Support of its Motion for Order to Show Cause ("Ammex's Reply") at 12. Revelations by Ammex at oral argument confirm that the issue now raised was neither part and parcel, nor conclusively determined in Ammex I.

Ammex previously maintained that this court's decision in Ammex I foreclosed all issues relevant to Customs' denial of Ammex's right to sell gasoline and diesel fuel duty-free, yet Ammex's October 23, 2000 letter to Customs states the following:

> Subsequent to the decision by the U.S. Court of International Trade, Ammex has commenced the sale of tax and duty free gasoline and diesel fuel, following U.S. Customs requirements and procedures. In conjunction with this operation, Ammex requires a letter from U.S. Customs stating that there are no taxes due at the time of bonded entry into the U.S. of gasoline and diesel fuel.

October 23 letter. Ammex explained at oral argument that the October 23 letter was an attempt by Ammex to obtain, and use in unrelated litigation, a certification from Customs that excise taxes were not applicable to certain fuel sold by Ammex. However, in addition, because it shows that Ammex itself would not rely on Ammex I on the excise tax question, the letter now serves to foreclose Ammex's res judicata and contempt arguments.

Having determined that the issue of federal taxes as applied to gasoline and diesel fuel and the concurrent consideration of whether such application preempts such fuel from qualifying as "duty-free merchandise" was neither part nor parcel of Ammex I, Ammex's Motion cannot be considered by the court under the present procedural posture. Ammex's Motion asks the court "to interpret § 1555(b)(8)(E) of Title 19--a Customs statute." Ammex's Reply at 12-13. This constitutes a new matter, one which was not contemplated in Ammex I. It therefore cannot be said that the revocation constitutes an attack on the court's prior judgment or order in this case. While the court does possess inherent power to determine the effect of its judgments and protect against attempts to attack or evade those judgments, in this case, the issue before the court is not encompassed by the prior order.

Customs did not violate this court's order in Ammex I by either determining, based on newly acquired information, that the fuel Ammex desires to sell can not qualify as "duty-free merchandise," and its subsequent revocation of Ammex's entitlement to sell gasoline and diesel fuel from its duty-free store, does not violate the decision in Ammex I. Ammex is entitled to challenge the basis for Customs' decision to revoke its September 5 letter. If, however, Ammex wishes to challenge this new, distinct basis for Customs' disallowance of Ammex's sale of gasoline and diesel fuel from its duty-free store, Ammex must raise this issue anew in the proper procedural manner. It cannot, as the Government contends, "thwart proper procedure and bootstrap a new grievance onto a dispute that has already been resolved." Defendant's Opposition at 20.

B

Res Judicata Argument

Ammex also argues that Customs' "attempt to relitigate the matter of Ammex's duty-free fuel sales with a previously-available argument is precluded under the long-standing doctrine of res judicata," a term "used broadly to refer to concepts of merger, bar, and direct and collateral estoppel [i.e., issue preclusion]." Plaintiff's Memo at 15. Two "major limitations" to such preclusion, however, are (1) "a requirement that at the time of the first litigation the parties be able to foresee the later litigation that came to present the same issue" and "a requirement that the issue have played an important role in the abstract hierarchy of legal rules controlling the first or the second litigation." 18 Wright, Miller & Cooper, Federal Practice and Procedure § 4424 at 226-227 (1981); see also Hyman v. Regenstein, 258 F.2d 502, 510-11, cert. denied, 359 U.S. 913, 79 S. Ct. 589, 3 L. Ed. 2d 575 (5th Cir. 1958) ("Collateral estoppel by judgment is applicable only when it is evident from the pleadings and record that determination of the fact in question was necessary to the final judgment and it was foreseeable that the fact would be of importance in possible future litigation."). The court finds that the narrow tax issue now raised was too far outside the ambit of the Ammex I proceedings either to be foreseeable or to play a crucial role in the final judgment of that case. Issue preclusion should thus not operate to bar either party from raising this issue in the correct procedural posture.

VI

CONCLUSION

For the foregoing reasons, Ammex's Motion for Order to Show Cause Why Defendant Should Not be Held in Contempt is denied.

Evan J. Wallach, Judge

Dated: February 22, 2002, New York, New York

02-1498

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

AMMEX, INC.,
Plaintiff-Appellant,

v.

UNITED STATES,
Defendant-Appellee.

October 7, 2003

A petition for rehearing en banc having been file by the APPELLANT, and a response thereto having been invited by the court and filed by the APPELLEE, and the matter having first been referred as a petition for rehearing to the panel that heard the appeal, and thereafter the petition for rehearing en banc and response having been referred to the circuit judges who are in regular active service,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, DENIED and it is further

ORDERED that the petition for rehearing en banc be, and the same hereby is, DENIED.

The mandate of the court will issue on October 14, 2003.

FOR THE COURT,

Jan Horbaly
Clerk

Dated: October 7, 2003

cc: Craig L. John
Amy M. Rubin

Court No.: 99-01-00013

UNITED STATES COURT OF
INTERNATIONAL TRADE

AMMEX, INC.,
Plaintiff,

v.

UNITED STATES,
Defendant.

August 25, 2000, Decided

COUNSEL: Steptoe & Johnson LLP (Herbert C. Shelley, Alice A. Kipel, Gregory S. McCue and David N. Tanenbaum), for Plaintiff.

David W. Ogden, Assistant Attorney General; Joseph I. Liebman, Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, United States Department of Justice (Amy M. Rubin); Beth C. Brotman, Office of Assistant Chief Counsel, United States Customs Service, of counsel, for Defendant.

JUDGES: Evan J. Wallach, Judge.

OPINIONBY: Evan J. Wallach

OPINION:

I

INTRODUCTION

This case is before the court upon the Motion Of Plaintiff Ammex, Inc. For Judgment Upon The Agency Record. Plaintiff challenges the decision of the U.S. Customs Service ("Customs") not to allow it to sell duty-free gasoline and diesel fuel from its duty-free store in Detroit, Michigan. For the reasons stated below, the court finds Custom's decision not to be in accordance with law.

II

BACKGROUND

At issue in this case is Plaintiff's challenge of Customs Headquarters Ruling 227385 of February 12, 1998 ("HQ 227385"). In HQ 227385, Customs reaffirmed a 1994 headquarters ruling which found that the activities of duty-free stores should not be extended to cover "unidentifiable fungible" goods, such as gasoline and diesel fuel, when sold on a retail basis. In the 1994 ruling, Customs found, inter alia, that because such merchandise could not be subject to marking or other identification under 19 U.S.C. § 1555(b)(3)(D), n1 Customs would have no practical way of ensuring that the duty-free gasoline was "declared" when vehicles returned to the United States. See Customs Headquarters Ruling 225287 of June 27, 1994 ("HQ 225287"), at 4-5.

In HQ 227385, Customs revisited the issue of duty-free gasoline and diesel sales in light of Plaintiff's request that Customs reconsider its 1994 ruling. Analyzing the legislative history of the Omnibus Trade and Competitiveness Act of 1988, which established legislative guidelines for Customs' administration of duty-free shops, Customs concluded that "the fact that Congress did not specifically reject Customs policy regarding the sale of gasoline by duty-free stores means that Congress did not object to such practice." HQ 227385 at 5. Thus, it reasoned, "in holding that gasoline and diesel fuel may not be sold by duty-free stores, it was proper to follow the precedent established by ruling letter 200396." Id. In Ruling Letter 200396, the Assistant Commissioner of Customs' Office of Regulations and Rulings, Leonard Lehman, held that the activities of duty-free stores could not be extended to unidentifiable fungibles, such as gasoline sold on a retail basis, since Customs would have no practical way of ensuring that the gasoline was declared when it was returned to the United States. Customs Ruling Letter 200396 of October 30, 1972. n2

In its 1998 ruling, Customs also rejected Plaintiff's argument that, in allowing U.S. residents to apply merchandise purchased from a U.S. duty-free store against their $ 400 personal duty exemption allowance, the Miscellaneous Trade and Technical Corrections Act of 1996 rendered Ruling Letter 200396 and HQ 225287 obsolete. Besides pointing to the lack of any explicit Congressional intent to overturn these determinations, Customs observed

that the eligibility for a duty exemption does not exempt the imported merchandise from being subject to other customs laws. The exemption from duty depends on the status of the individual and the circumstances regarding the exportation of the goods, the time spent out of the United States, and the frequency of the claims for eligibility. In order to administer those requirements, the need for simple effective controls has not been lessened by the 1996 statutory change.

HQ 227385 at 7.

By letter dated May 12, 1998, Ammex, Inc. ("Ammex") attempted to protest HQ 227385 under 19 U.S.C. § 1514(a) (1994). On July 9, 1998, Customs ruled that HQ 227385 was not protestable under this provision, since HQ 227385 did not require Ammex to make any payment or cause an assessment on any kind. See Customs Headquarters Ruling 228021 of July 9, 1998. Thereafter, Plaintiff filed its Complaint in this matter on January 12, 1999, timely putting its challenge to HQ 227385 before this court. After considering various motions by Plaintiff to either supplement the administrative record in this case and/or conduct limited discovery, n3 the court heard oral argument on August 16, 2000.

The court has jurisdiction under 28 U.S.C. § 1581(i) (1994). See Duty Free Int'l. Inc. v. United States, 17 C.I.T. 1425, 1425 (1993), aff'd 88 F.3d 1046 (Fed. Cir. 1996). n4

III

THE COURT SHALL HOLD UNLAWFUL AGENCY ACTION THAT IS ARBITRARY, CAPRICIOUS, AN ABUSE OF DISCRETION, OR NOT IN ACCORDANCE WITH LAW.

28 U.S.C. § 2640(e) (1994) provides that "in any civil action not specified in this section, the [court] shall review the matter as provided in [5 U.S.C. § 706]." In turn, 5 U.S.C. § 706(2)(A) (1994) provides, in relevant part, that "the reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions of law found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." The scope of the court's review is limited to the "whole record or those parts of it cited by a party." 5 U.S.C. § 706 (1994) (emphasis added); see also Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 420, 28 L. Ed. 2d 136, 91 S. Ct. 814 (1971) (stating that a review of the "whole record" under § 706 "is to be based on the full administrative record that was before the Secretary at the time he made his decision").

IV

CUSTOMS' DECISION TO PROHIBIT AMMEX FROM SELLING DUTY-FREE GASOLINE AND DIESEL FUEL IS NOT IN ACCORDANCE WITH LAW.

Plaintiff first argues that Customs' decision to prohibit Ammex from selling duty-free gasoline and diesel fuel violates 19 U.S.C. § 1557(a)(1) (1994), which allows "any merchandise subject to duty, with the exception of perishable articles and explosive substances" to be entered and withdrawn (for exportation) from bonded warehouses, such as duty-free stores. According to Plaintiff, Customs' prohibition on the sale of "unidentifiable fungibles," such as gasoline and diesel fuel, creates an additional exception to the general authorization set forth in § 1557(a)(1) that enjoys no support in either the statute or its implementing regulations. See Brief In Support Of Ammex's Rule 56.1 Motion For Judgment Upon The Agency Record ("Plaintiff's Brief") at 9-13.

The first question to consider in reviewing an agency's construction of a statute it administers is "whether Congress has directly spoken to the precise question at issue." Chevron, U.S.A., Inc. v. United States, 467 U.S. 837, 842, 81 L. Ed. 2d 694, 104 S. Ct. 2778 (1984). "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." Id. at 842-43; see also Timex V.I., Inc. v. United States, 157 F.3d 879, 882 (Fed. Cir. 1998) ("To ascertain whether Congress had an intention on the precise question at issue, we employ the traditional tools of statutory construction. The first and foremost tool to be used is the statute's text, giving it its plain meaning.") (internal quotes and citation omitted).

In this case, 19 U.S.C. § 1557(a)(1) (1994), as well as the other provisions covering duty-free stores and bonded warehouses, make clear the scope of merchandise that may be entered and withdrawn from duty-free enterprises. In relevant part, § 1557(a)(1) provides that

> Any merchandise subject to duty, with the exception of perishable articles and explosive substances other than firecrackers, may be entered for warehousing and be deposited in a bonded warehouse at the expense and risk of the owner [,] purchaser, importer, or consignee. Such merchandise may be withdrawn, at any time within 5 years from the date of importation, for consumption upon payment of the duties and charges accruing thereon at the rate of duty imposed by law

upon such merchandise at the date of withdrawal; or may be withdrawn for exportation or for transportation and exportation to a foreign country . . . . (emphasis added).

On its face, the plain language of § 1557(a)(1) shows Congress' intent that there be only two restrictions on the type of dutiable merchandise that may be stored or withdrawn from a bonded warehouse: (1) perishable articles and (2) explosive substances other than firecrackers. Customs did not find that diesel fuel and gasoline fall within either of these exceptions. n5 Accordingly, since duty-free stores are a type of bonded warehouse, n6 the plain language of § 1557(a)(1) makes both items eligible for sale from duty-free stores. n7

In its brief, the government asserts that § 1557(a)(1) is not dispositive of Plaintiff's claim, arguing the more specific provisions for duty-free stores set out in 19 U.S.C. § 1555(b)(3)(D) and (E) provide additional limitations on the type of merchandise that may be sold duty-free. See Defendant's Response To Plaintiff's Motion For Judgment Upon The Agency Record ("Defendant's Response") at 13-15: see also HQ 225287 at 4 ("Clearly, inclusion of this caveat [§ 1555(b)(3)] indicates an intent that the merchandise which could be sold in a duty-free store would be 'individual items of merchandise' which could be market or otherwise identified."). In relevant part, 19 U.S.C. § 1555(b)(3) (1994) provides that "each duty-free sales enterprise":

(D) shall not be required to mark or otherwise place a distinguishing identifier on individual items of merchandise to indicate that the items were sold by a duty-free sales enterprise, unless the Secretary finds a pattern in which such items are being brought back into the customs territory without declaration;

(E) may unpack merchandise into saleable units after it has been entered from warehouse and placed in a duty-free sales enterprise, without requirement of further permits.

According to Defendant, by providing that duty-free stores will not be required to mark "individual items of merchandise" unless a pattern of reimportation exists, and that merchandise may be unpacked into saleable units, "Congress was plainly indicating the existence of four factors with respect to the type of merchandise that may be sold in a duty-free store: (1) the goods sold in duty-free stores constitute 'individual items of merchandise,' (2) the goods actually sold in duty-free stores consist of pre-designated 'saleable units,' (3) the goods sold in duty-free stores must be capable of being marked, and (4) if a pattern of reimportation exists with respect to particular goods, the Secretary must have some means of detecting such a pattern." Defendant's Response at 15-16. Because gasoline and diesel fuel possess none of these features, Defendant asserts, Customs correctly prohibited their sale from duty-free stores. See id. at 15-16.

Essentially, the government reads § 1555(b)(3)(D) as authorizing Customs to require duty-free enterprises to sell only individual items of merchandise that are capable of being individually marked. On its face, § 1555(b)(3)(D) supports no such interpretation. Section 1555(b)(3)(D) simply gives Customs the power to identify merchandise that is being reimported without declaration; nothing in the language or history of this provision authorizes Customs to prohibit the sale of certain merchandise outright, or encumber the sale of merchandise before a pattern of illegal reimportation is discovered. In fact, Defendant's interpretation is directly contrary to Congress' intent, as evidenced in the relevant conference report, that Customs impose the least restrictions possible on the sale of duty-free merchandise. n8

Defendant's characterization of 19 U.S.C. § 1555(b)(3)(E) (1994) is similarly strained. This provision provides simply that a duty-free enterprise "may unpack merchandise into saleable units." Defendant's interpretation, however, essentially substitutes the phrase "shall sell" for the language "may unpack," and imposes the limiting adjective "pre-designated" before "saleable units." See Defendant's Response at 15 (arguing that "Congress was plainly indicating . . . [that] . . . the goods actually sold in duty-free stores consist of pre-designated 'saleable units.'") (emphasis added). In doing so, Defendant significantly distorts the meaning of this statute, converting a general congressional authorization concerning the unpacking of merchandise into a specific congressional delineation of what merchandise may be sold duty-free. No reasonable interpretation of § 1555(b)(3)(E) supports such a fundamental change.

Accordingly, because there is no conflict between 19 U.S.C. § 1557(a)(1) (1994) and the specific provisions under 19 U.S.C. § 1555(b) (1994) for duty-free enterprises, n9 § 1557(a)(1) is dispositive of Plaintiff's claim. In view of § 1557(a)(1)'s instruction that "any merchandise subject to duty" may be entered and withdrawn from a bonded warehouse, the court finds that Customs violated this provision in promulgating HQ 227385. Section 1557(a)(1) provides that all types of dutiable merchandise may be sold from bonded warehouses, including duty-free stores, and it was error for the government to read into 19 U.S.C. § 1555(b)(3)(D) and (E) an exception beyond those specifically stated in § 1557(a)(1). See A. H. Phillips, Inc. v. Walling, 324 U.S. 490, 493, 89 L. Ed. 1095, 65 S. Ct. 807 ("To extend an exemption to other than those plainly and unmistakably within [a statute's] terms and spirit is to abuse the interpretative process and to frustrate the announced will of the people."). n10 Had Congress intended Customs to restrict the sale of gasoline, diesel fuel, or other such fungible merchandise through duty-free stores, as the government claims, it could have included language to this effect in the statute. That Congress failed to identify such an intention in either the language or legislative history of § 1555(b), however, persuades this court that the statute contains no such restriction. n11 See Ciba-Geigy Corp. v. United States, 223 F.3d 1367, 2000 U.S. App. LEXIS 19843, 2000 WL 1141256 at *6 (Fed. Cir. 2000) ("When confronted with unambiguous statutory language, we will not discount the statute's plain language by assuming ignorance on the part of Congress. . . . If . . . the [statute] no longer reflects the intent of Congress, it is Congress's task to change the words of the statute."); Ishida v. United States, 59 F.3d 1224, 1231 (Fed. Cir. 1995) (noting that, had Congress intended to limit the coverage of the Civil Liberties Act of 1988 in the manner asserted by the government, Congress could have expressed its intent in the statutory language). n12

V

CONCLUSION

For the foregoing reasons, the court finds that Customs acted unlawfully in prohibiting Ammex from selling duty-free gasoline and diesel fuel, and therefore grants the Motion Of Plaintiff Ammex, Inc. For Judgment Upon The Agency Record. Judgment to this effect shall be entered accordingly.

Evan J. Wallach, Judge

Date: August 25, 2000, New York, New York

FOOTNOTES

n1 In relevant part, 19 U.S.C. § 1555(b) (1994), which governs "duty-free sales enterprises," provides as follows:

(3) Each duty-free sales enterprise . . . (D) shall not be required to mark or otherwise place a distinguishing identifier on individual items of merchandise to indicate that the items were sold by a duty-free sales enterprise, unless the Secretary finds a pattern in which such items are being brought back into the customs territory without declaration.

n2 Ruling Letter 200396 was also cited approvingly and quoted in HR 225287. See HQ 225287 at 3 and 5.

n3 See Ammex, Inc. v. United States, 62 F. Supp. 2d 1148 (CIT 1999) (granting in part and denying in part Plaintiff's motion for discovery); the court's Order dated December 6, 1999 (granting Plaintiff's unopposed motion for additional discovery); and Ammex, Inc. v. United States, 86 F. Supp. 2d 1278 (CIT 1999) (denying Plaintiff's motion to supplement the administrative record and seek additional discovery).

n4 Both parties agree that jurisdiction rests under § 1581(i), which provides this court with jurisdiction over "any civil action . . . that arises out of any law . . . providing for- (1) revenue from imports or tonnage; (2) tariffs . . . on the importation of merchandise for reasons other than the raising of revenue; (3) embargoes or other quantitative restrictions . . . for reasons other than the protection of the public health or safety; or (4) administration and enforcement with respect to [such] matters . . . ." In its brief, however, Plaintiff also alleges jurisdiction under § 1581(h), which allows for certain pre-importation rulings where, inter alia, an importer "demonstrates . . . that he would be irreparably harmed unless given an opportunity to obtain judicial review prior to . . . importation." Although Defendant argued, and Plaintiff conceded at oral argument, that § 1581(h) did not lie in this case, the court is constrained to independently determine whether any other basis for jurisdiction supersedes § 1581(i). See NEC Corp. v. United States, 151 F.3d 1361, 1368 (Fed. Cir. 1998) (finding jurisdiction under § 1581(i) "available only when jurisdiction under another subsection of 1581 is either unavailable or, if available, 'manifestly inadequate'").

To show irreparable harm for purposes of § 1581(h), Plaintiff submitted the affidavit of Mr. Francois Levesque, President of Ammex, Inc., which states that Ammex has "sustained significant financial losses . . .

through the loss of duty-free gasoline and diesel fuel sales." Mr. Levesque's affidavit, however, lacks any foundational basis for this conclusion, as there is no indication that he conducted a review of admissible evidence and was qualified to reach conclusions about it. See USCIT R. 56(e) ("Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein."). As Plaintiff has not provided any other relevant evidence, it has not demonstrated irreparable harm for purposes of § 1581(h). Compare Holford USA Ltd. Inc. v. United States, 19 C.I.T. 1486, 1492, 912 F. Supp. 555, 560 (1995) (holding that affidavits, plus other supporting materials, adequately demonstrated irreparable harm). Accordingly, because the other provisions of § 1581 (§ 1581(a)-(c)) are inapposite to Plaintiff's claim, the court finds jurisdiction proper under § 1581(i).

n5 Nor does it appear that Customs could have made such a finding. See 18 U.S.C. § § 841(c) ("'Explosive materials' means explosives, blasting agents, and detonators."), 841(d) ("'Explosives' means any chemical compound mixture, or device, the primary or common purpose of which is to function by explosion; [including] dynamite and other high explosives, black powder, pellet powder, initiating explosives, detonators, safety fuses, squibs, detonating cord, igniter cord, and igniters.") and 841(e) (1994) ("'Blasting agent' means any material or mixture, consisting of fuel or oxidizer, intended for blasting . . . ."); "List of Explosive Materials," ATF Pub. P 5400.8 (listing explosives, blasting agents and detonators subject to regulation under 18 U.S.C. Chapter 40); see also 18 U.S.C. § 844(j)

(1994) (defining "explosive" for various criminal provisions). Customs, in its regulations, distinguishes between "explosive substances" and other "dangerous and highly flammable merchandise." See 19 C.F.R. § 144.1 (2000) ("Dangerous and highly flammable merchandise, though not classified as explosive, shall not be entered for warehouse without the written consent of the insurance company insuring the warehouse . . . .").

n6 The relevant statutory provisions make clear that duty-free stores are a type, or subsection, of bonded warehouses. Not only is the specific provision for duty-free sales enterprises (19 U.S.C. § 1555(b) (1994)) a subsection of the general statute (§ 1555) for bonded warehouses, but 19 U.S.C. § 1555(b)(7) (1994) provides that "the Secretary shall by regulation establish a separate class of bonded warehouses for duty-free sales enterprises." See also 19 C.F.R. § 19.35(a) (1997) (designating duty-free stores as "Class 9 warehouses" and providing that "except insofar as the provisions of this section and § § 19.36-19.39 are more specific, the procedures for bonded warehouses apply to duty-free stores (Class 9 warehouses)."); S. Rep. 100-71, at 230 (1988) ("Duty-free sales enterprises are a special category of 'bonded warehouses' and it is under the bonded warehouse provisions of section 555 (and related sections) of the Tariff Act that they have been regulated.").

n7 In response to the court's Order of July 27, 2000, that the parties be prepared to discuss the history of this statute, at oral argument both counsel presented sophisticated and useful analyses. As the court noted at the time, Plaintiff's counsel did a particularly extensive and thorough job in tracing the origin of this statute, and is commended for that effort.

n8 See House Conf. Rep. No. 100-576, at 769-70 (1988), reprinted in 1988 U.S.C.C.A.N. at 1802-03 ("This amendment creates a limited exception to the general prohibition on any requirement that duty-free stores mark their merchandise to indicate that it was sold in a duty-free store. It authorizes the Secretary, in particular circumstances, to require a duty-free store to apply an inconspicuous mark or distinguishing identifier on certain of its merchandise. Before imposing such a requirement, the Secretary must find that a pattern or practice exists involving the reimportation of duty-free merchandise without declaration, occurring over a significant period of time. It is not intended that episodic or occasional instances would constitute a pattern or practice.").

n9 Nor is there any conflict between § 1557(a)(1) and any regulation promulgated by Customs. 19 C.F.R. § 19.36(e) (1997), governing "merchandise eligible for warehousing," states simply that "only conditionally duty-free merchandise may be placed in a bonded storage area of a Class 9 warehouse." "Conditionally duty free merchandise," in turn, is defined as "merchandise sold by a duty-free store on which duties and/or internal revenue taxes (where applicable) have not been paid." 19 C.F.R. § 19.35(a) (1997).

n10 See also Sutherland Statutes And Statutory Construction (6th ed. 2000), § 47:11 ("Where a general provision in a statute has certain limited exceptions, all doubts should be resolved in favor of the general provision rather than the exceptions.")

n11 This is particularly true since, in promulgating specific provisions to govern duty-free enterprises, Congress sought to establish a comprehensive statutory framework that would provide for greater uniformity and consistency in the regulation of duty free sales enterprises. See Duty Free Int'l v. United States, 16 C.I.T. 163, 164-65 (1992) (quoting and discussing § 1908(a) of The Omnibus Trade and Competitiveness Act of 1988, Pub.L. No. 100-418, and S.Rep. No. 100-71 (1987) at 229-30).

n12 In addition to arguing that HQ 227385 violates 19 U.S.C. § 1557(a)(1) (1994), Plaintiff argues, inter alia, that Customs' determination was unreasonable because it ignored Customs' modern ability to monitor duty-free fuel sales through dyes and license plate monitoring. See Plaintiff's Brief at 17-19. Plaintiff also claims that Customs' ban on "unidentifiable fungibles" is at odds with its own regulation governing the accounting for fungible merchandise. See id. at 11-12 (discussing 19 C.F.R. § 19.12(f)(2), which provides that "FIFO inventory procedures may be used only for fungible merchandise. For purposes of this section, 'fungible merchandise' means merchandise which is identical and interchangeable for all commercial purposes.").

While these arguments have substantial merit, further discussion is unnecessary, given the court's holding that Customs' ruling violated § 1557(a)(1).

Court No.: 99-01-00013

UNITED STATES COURT OF INTERNATIONAL TRADE

AMMEX, INC.,
Plaintiff,

v.

UNITED STATES,
Defendant.

JUDGMENT ORDER

This case having come before the court upon the Motion Of Plaintiff Ammex, Inc. For Judgment Upon The Agency Record ("Plaintiff's Motion"); the court having reviewed the papers and pleadings on file herein, having heard oral argument by each party, and after due deliberation, having reached a decision herein; now, in conformity with said decision, it is hereby

ORDERED ADJUDGED AND DECREED that Plaintiffs' Motion is GRANTED; and it is further

ORDERED ADJUDGED AND DECREED that U.S. Customs Service Headquarters Ruling 227385 of February 12, 1998, is contrary to law, and hereby set aside; and it is further

ORDERED ADJUDGED AND DECREED that 19 U.S.C. § § 1555 and 1557 allow the duty-free sale of gasoline and diesel fuel from a duty-free enterprise.

Evan J. Wallach, Judge

Dated: August 25, 2000, New York, New York

HQ 225287

June 7, 1994

WAR-5-CO:R:C:E 225287 PH

CATEGORY: Warehouse

District Director U.S. Customs Service Detroit, Michigan 48226

RE: Internal Advice; Duty-Free Stores; Sale of Gasoline and Diesel Fuel; 19 U.S.C. 1555(b); 19 CFR 19.35 through 19.39 Dear Sir:

In your memorandum of March 23, 1994 (File: WAR-1-IC:WJR AMMEX5/TXTMONIC), you requested internal advice concerning a proposal to sell "duty-free" gasoline and diesel fuel at a duty- free store in your District. Our ruling follows:

FACTS:

You state that a duty-free store operator (the "operator") in your District has proposed to sell duty-free gasoline and diesel fuel at its duty-free store. You state that the operator has modified the store under consideration by "adding fencing, electronic gates, and constructing a private road leading directly from their sterile compound to the toll booths on the bridge plaza." The operator formally requested permission to operate this facility as a sterile shop with "live" products. During your physical inspection of the facility, you noted a gasoline/diesel station within the sterile area.

You state that in your December 23, 1994, letter tentatively approving the request, you excluded any bonded fuel operations. On the same date, the operator requested that you reconsider your position on the bonded petroleum operation. In a follow-up letter dated January 24, 1994, the operator formally requested that you approve a bonded petroleum product operation at its duty-free store. In this letter, a copy of which you enclosed, it is stated (in part):

The petroleum would be sold for export, and would indeed be exported as all other bonded merchandise from this facility.

The product would be imported ... by bona fide importation procedures including the use of licensed customs brokers, bonded bulk carriers/cartman, and would be subject to inventory control and monitoring verification, just like other bonded merchandise from this facility.

The dispensing of petroleum products from the duty free plaza would be similar to the exi[s]ting programs for air carriers at various international airports.

In your memorandum you request advice on the issues in the ISSUES portion of this ruling.

ISSUES:

(1) Does gasoline and diesel fuel of foreign origin qualify for "duty free" control by Customs under the Warehouse Entry/Withdrawal for Export procedures?
(2) If a facility is considered an "exit" point for bonded

merchandise, would it also qualify as an "exit" point for bonded fuel?

3. Since the duty on foreign sourced fuel is only .0125 cents per gallon, the real savings would be the exemption from federal and state excise taxes. Can copies of fuel warehouse entries be given to the U.S. Internal Revenue Service for enforcement purposes? What would be the restrictions if a similar request is made by the State of Michigan?

(4) Are their any legal determinations or directives covering the dispensing of bonded fuel at a border location? Does fuel qualify as "personal use quantities for consumption outside the United States?" Should sales be subject to other restrictions?

LAW AND ANALYSIS:

Duty-free sales enterprises are provided for in 19 U.S.C.

1555(b). This provision was enacted by section 1908, title I, Omnibus Trade and Competitiveness Act of 1988 (Public Law 100- 418; 102 Stat. 1315). Under this provision:

(1) Duty-free sales enterprises may sell and deliver for export from the customs territory duty-free merchandise in accordance with this subsection and such regulations as the Secretary may prescribe to carry out this subsection.

...

(3) Each duty-free sales enterprise—

(A) shall establish procedures to provide reasonable assurance that duty-free merchandise sold by the enterprise will be exported from the customs territory; ...

(D) shall not be required to mark or otherwise place a distinguishing identifier on individual items of merchandise to indicate that the items were sold by a duty-free sales enterprise, unless the Secretary finds a pattern in which such items are being brought back into the customs territory without declaration; ...

(7) The Secretary shall by regulation establish a separate class of bonded warehouses for duty-free sales enterprises. Regulations issued to carry out this paragraph shall take into account the unique characteristics of the different types of duty-free sales enterprises.

Before enactment of this provision in 1988, duty-free stores were administered by Customs directives, rather than through any specific legislation or regulations (see Treasury Decision 92-81, published in the Federal Register on August 20, 1992 (57 F.R. 37692), and Duty Free International, Inc., Ammex Warehouse Co., Inc., and Ammex Tax & Duty Free Shops, Inc., v. United States, CIT Slip Op. 93-246, printed at 28 Cust. Bull. & Dec. 3, January 19, 1994, p. 36).

In its administration of duty-free stores before enactment of the 1988 legislation, Customs addressed the issue under consideration. In a ruling letter dated

October 30, 1972 (File: DB 711.2 LO 200396), the then Assistant Commissioner of Customs, Office of Regulations, held in regard to the proposed handling of gasoline and diesel products in duty-free stores that:

> We do not believe that the activities of "duty-free stores" can be extended to unidentifiable fungibles sold on a retail basis without seriously impairing our control over the operations of these stores and the merchandise sold by them. In this respect it should be noted that merchandise purchased from a duty-free store when returned to the United States, must be declared for the purpose of collecting the duty and internal-revenue taxes. Customs would have no practical means of enforcing this requirement against any of the automobiles returning to the United States from Canada with "unidentifiable" gasoline in their tanks.

The 1988 legislation does not directly address the issue under consideration. We have researched the legislative history to the legislation. The only such history we have found which may indicate an intent in this regard is found in the Congressional Record (July 15, 1987, p. S 9952, remarks of Senator Bentsen), where it was stated:

> Section 921 [of a predecessor to the enacted legislation] is not intended to change the way duty-free stores currently operate, but rather to codify current practice by providing a regulatory framework for continued operation of duty-free stores in the future.

As noted above, at the time this statement was made and at the time of passage of the 1988 legislation, the current practice was not to allow unidentifiable fungibles, such as gasoline and diesel products for use in automobiles, to be sold on a retail basis by duty-free stores. Thus, the only legislative history we have been able to find which may be applicable to this issue indicates that there was no intent, at least by the Senator making these remarks, to change the then current practice. Current practice, as shown by the quoted ruling, was not to allow uniden- tifiable fungibles, such as gasoline and diesel products for use in automobiles, to be sold on a retail basis by duty-free stores.

Although the 1988 legislation does not directly address the issue under consideration, the statute does contain a provision indicating that "unidentifiable fungibles" were not intended to be allowed to be sold in duty-free stores. Under 19 U.S.C.

1555(b)(3)(D), a duty-free enterprise shall not be required to "mark or otherwise place a distinguishing identifier on individual items of merchandise" to indicate that the items were sold by a duty-free sales enterprise, unless the Secretary finds a pattern in which such items are being brought back into the Customs territory without declaration. This caveat (i.e., permitting the placement of a mark or other distinguishing identifier on individual items of merchandise in the stated circumstance) was added in Conference (see H. Conf. Rep. No. 100- 576, p. 769 (100th Cong., 2d Sess., 1988), printed at 1988 U.S.C.C.A.N. 1547, 1801-1803). Clearly, inclusion of this caveat indicates an intent that the merchandise which could be sold in a duty-free store would be "individual items of merchandise" which could be marked or otherwise identified. "Unidentifiable fungibles", such as gasoline and diesel products for use in automobiles, are not such "individual items".

We have also reviewed the Customs Regulations (see 19 CFR 19.35 et seq.) issued under 19 U.S.C. 1555(b) and the regulatory history for those regulations (see Federal Register of May 17, 1991 (56 F.R. 22833), August 20, 1992 (57 F.R. 37692), October 16, 1992 (57 F.R. 47409), and May 20, 1993 (58 F.R. 29349). Nowhere in these materials is there any indication of an intent to permit the sale by duty-free stores of the merchandise under consideration. We note that the caveat discussed above (i.e., relating to marking or otherwise identifying individual items of merchandise in the described circumstance) is specifically provided for in the Customs Regulations (19 CFR 19.36(d)).

In its January 24, 1994, letter, the operator contends that the gasoline and diesel fuel could be controlled "just like other bonded merchandise from this facility" and that "dispensing of petroleum products from the duty free plaza would be similar to the exi[s]ting programs for air carriers at various international airports." As demonstrated above, the gasoline and diesel fuel could not be controlled like other bonded merchandise sold at duty-free stores (i.e., because gasoline and diesel fuel are "unidentifiable fungibles" not subject to marking or other identification as provided for in the statute and regulations). Further, the proposal is not similar to existing programs for air carriers. We assume that the program to which the operator refers is that authorized in 19 U.S.C. 1309 and the Customs Regulations issued thereunder (19 CFR 10.59 - 10.65). Note that these regulations specifically provide for fuel to be used as supplies for vessels (and aircraft (19 CFR 10.59(d))) (i.e., see 19 CFR 10.62). Note also that the trade in which these vessels and aircraft may be engaged is carefully circumscribed and that there is a statutory and regulatory structure under which Customs controls the movements of vessels and aircraft departing from, arriving at, and moving between points in the United States (see 19 CFR Parts 4 and 122).

Based on the foregoing, we conclude that duty-free gasoline and diesel fuel for automobiles may not be sold at a duty-free store, as described in your memorandum and the materials forwarded with your memorandum. In light of this conclusion, the other issues which you raised are made moot and need not be addressed.

HOLDING:

Duty-free gasoline and diesel fuel for automobiles may not be sold, as described in the FACTS portion of this ruling, at a duty-free store provided for in 19 U.S.C. 1555(b).

EFFECT ON OTHER RULINGS:

Ruling letter dated October 30, 1972 (File: DB 711.2 L 200396), FOLLOWED.

The Office of Regulations and Rulings will take steps to make this decision available to Customs personnel via the Customs Rulings Module in ACS and the public via the Diskette Subscription Service, Lexis, Freedom of Information Act and other public access channels 60 days from the date of this decision.

Sincerely,

John Durant, Director Commercial Rulings Division

HQ 227385

February 12, 1998

WAR-5 RR:CR:DR 227385 CB/WGR

CATEGORY: Warehouse

David Serko, Esq.

Serko & Simon One World Trade Center Suite 3371
New York, NY 10048

RE: Request for Reconsideration of HQ 225287; Duty-Free Stores; Sale of Gasoline and Diesel Fuel; 19 U.S.C. 1555(b); 19 CFR 19.35 - 19.39; Pub. L. 104-295; 29 Miscellaneous Trade and Technical Corrections Act of 1996

Dear Mr. Serko:

This is in response to your letters of September 8, 1995, April 19, 1996, and July 22, 1997, wherein you requested our reconsideration of HQ 225287, issued June 27, 1994. This internal advice concerned a proposal to sell "duty-free" gasoline and diesel fuel at a duty-free store in Detroit, Michigan. We concluded that such an operation did not fall within the scope of 19 U.S.C. 1555(b). We have considered the additional arguments you have raised and our decision follows.

FACTS:

You state that your client in this matter has been granted approval by Customs to operate a "sterile" duty-free store at the Ambassador Bridge in Detroit, Michigan. In HQ 225287, the duty-free store was described as having been modified by "adding fencing, electronic gates, and constructing a private road leading directly from their sterile compound to the toll booths on the bridge plaza." According to the FACTS in HQ 225287, when the District Director of Customs physically inspected the facility, he noted a gasoline/diesel station within the sterile area. The District Director, in a letter of December 23, 1994, tentatively approved the request for permission to operate the facility as a sterile shop with "live" products, but excluded any bonded fuel operations. In response to a request by your client that the District Director reconsider his position on the bonded petroleum operation and a follow-up letter dated January 24, 1994, formally requesting approval of a bonded petroleum product operation at its duty-free store, the District Director requested internal advice from this office.

This office issued a ruling on the matter on June 27, 1994 (HQ 225287). In that ruling we reviewed the applicable law and regulations, noting that neither directly addressed the issue under consideration. We noted that before passage of the legislation involved (section 1908, title I, Omnibus Trade and Competitiveness Act of 1988 (Pub. L. No. 100-418; 102 Stat. 1315; codified as 19 U.S.C. 1555(b)), Customs had issued a ruling in regard to the proposed handling of gasoline and diesel products in duty-free stores. We quoted from that ruling (ruling letter 200396, October 30, 1972) as follows:

We do not believe that the activities of "duty-free stores" can be extended to unidentifiable fungibles sold on a retail basis without seriously impairing our control over the operations of these stores and the merchandise sold by them. In this respect it should be noted that merchandise purchased from a duty-free store when returned to the United States, must be declared for the purpose of collecting the duty and internal-revenue taxes. Customs would have no practical means of enforcing this requirement against any of the automobiles returning to the United States from Canada with "unidentifiable" gasoline in their tanks.

On the basis of ruling 200396 and the provision in 19 U.S.C.

1555(b)(3)(D) (under which a duty-free enterprise is not required to "mark or otherwise place a distinguishing identifier on individual items of merchandise" to indicate that the items were sold by a duty-free sales enterprise unless the Secretary finds a pattern in which such items are being brought back into the Customs territory without declaration), we concluded that "the gasoline and diesel fuel could not be controlled like other bonded merchandise sold at duty-free stores (i.e., because gasoline and diesel fuel are unidentifiable fungibles' not subject to marking or other identification as provided for in the statute and regulations)." We ruled, in HQ 225287, that:

Duty-free gasoline and diesel fuel for automobiles may not be sold, as described in the FACTS portion of [the] ruling, at a duty-free store provided for in 19 U.S.C. 1555(b).

In your letter of September 8, 1995, you requested that Customs reconsider HQ 225287, arguing that Customs was not "fully versed in the facts and briefed on the law and its legislative history" when the ruling was issued. At your request, you and other representatives of your client met with representatives of this office about this matter. In addition, you and other representatives have submitted additional materials in this regard.

In your April 19, 1996, letter, you noted that the District Director's December 23, 1993, letter, in which he found that the facility "has fulfilled the requirements necessary to qualify as an exit point as defined in 19 CFR 19.35(d)." You provide a map of the bridge, duty-free store, and connecting roadways and state that "[i]n fact, patrons of the store have no practical alternative except to cross the bridge into Canada." You refer to security measures (i.e., the addition of manned toll booths at the entrances leading to the duty-free store) of which this office was not aware at the time of, and could not consider, in HQ 225287.

In that letter, you also described measures which would help ensure that gasoline or diesel fuel sold by the duty-free store for automobiles would be exported and practical means by which Customs could enforce the provisions for the dutiability of such gasoline or diesel fuel which is brought back into the Customs territory. You state that, among other things, cash register receipts signed by customers acknowledge that the sales are "For Export Only." Additionally, you client ". . . has a computer system which can be used in cooperation with Customs for the tracking of fuel sales." You state that ". . . a single Customs license plate query can automatically determine if the vehicle received gasoline at the . . . facility prior to entering Canada, in addition to Customs' other purposes for the query."

ISSUES:

1. May duty-free gasoline and diesel fuel for automobiles be sold, as described in the FACTS portion of this ruling, at a duty-free store provided for in 19 U.S.C. 1555(b)?

2. Does the amendment of the personal exemption provision of the tariff laws demonstrate a Congressional intent to overturn ruling letter HR 225287 with respect to duty-free shops?

LAW AND ANALYSIS:

Issue 1:

Duty-free sales enterprises are provided for in 19 U.S.C.

1555(b). This provision was enacted by section 1908, title I, Omnibus Trade and Competitiveness Act of 1988 (Pub. L. No. 100-418; 102 Stat. 1315). Under this provision:

(1) Duty-free sales enterprises may sell and deliver for export from the customs territory duty-free merchandise in accordance with this subsection and such regulations as the Secretary may prescribe to carry out this subsection.

...

(3) Each duty-free sales enterprise—

(A) shall establish procedures to provide reasonable assurance that duty-free merchandise sold by the enterprise will be exported from the customs territory;

. . .

(D) shall not be required to mark or otherwise place a distinguishing identifier on individual items of merchandise to indicate that the items were sold by a duty-free sales enterprise, unless the Secretary finds a pattern in which such items are being brought back into the customs territory without declaration;

(7) The Secretary shall be regulation establish a separate class of bonded warehouses for duty-free sales enterprises. Regulations issued to carry out this paragraph shall take into account the unique characteristics of the different types of duty-free sales enterprises.

Before enactment of this provision in 1988, duty-free stores were administered by Customs directives, rather than through any specific legislation or regulations (see Treasury Decision 92-81, published in the Federal Register on August 20, 1992 (57 F.R.

37692), and Duty Free International, Inc., Ammex Warehouse Co., Inc. , and Ammex Tax & Duty Free Shops, Inc. v. United States, 17 CIT 1425 (1993)). It is your position that when Congress enacted the Omnibus Trade and Competitiveness Act, supra, it intended to substantially change the manner in which duty-free shops could be operated. Consequently, ruling letter 200396, relied upon in HQ 225287, was overridden by Congress in 1988. You argue that the 1972 ruling and the positions taken therein were never mentioned in any of the legislative history which led up to the passage of the 1988 law which is the basis for the current statutory framework. Moreover, there is no evidence that Congress was aware of this ruling. Thus, you conclude that Congress intended to abandon any practice it did not specifically adopt. It is also your position that the legislative history relied upon in HQ 225287 was taken out of context.

As stated in HQ 225287, the 1988 legislation does not directly address the issue under consideration. Although we agree with you that Congressional intent, in enacting 19 U.S.C. 1555(b), was to legislatively direct Customs in its administration of duty-free shops, it is also true that Congress left it up to the Secretary of the Treasury (which in turn has delegated this authority to Customs) to issue regulations implementing the statutory provision. More importantly, it is provided that the regulations shall take into account the unique characteristics of the different types of duty-free stores. Thus, although Congress provided the broad statutory framework, it was left up to the administering agency to fill-in the details to carry out Congressional intent. Regarding the legislative history relied upon in HQ 225287, we disagree with your interpretation. It is your position that Senator Bentsen's comments is not supportive of Customs position. In your letter you quote certain remarks made by Senator Bentsen (however a cite was not provided) and conclude that the Senator did not see the then proposed legislation as the means of restraining the activity of duty-free shops. However, the quote you have used is not the one referred to in HQ 225287. The statement made by

Senator Bentsen and relied upon by Customs reads as follows:

> . . . Mr. President, section 921 of the bill would introduce for the first time a comprehensive framework for the regulation and operation of duty-free sales stores. . . .
>
> Section 921 is not intended to change the way duty-free stores currently operate, but rather to codify current practice by providing a regulatory framework for continued operation of duty-free stores in the future.
>
> . . .

Congressional Record, (July 15, 1987, p. S 9952, remarks of Senator Bentsen). Thus, it is clear that, contrary to your assertion that Senator Bentsen was only referring to border stores in the State of Texas, the quoted text provides clear Congressional intent to codify procedures which had been implemented through Customs directives and circulars. Senator Bentsen's remark is the only indication contained in the legislative history which addresses the point raised; that is, whether the purpose of the legislation was to codify or change the existing Customs practice. The statement is consistent with the purpose of providing a statutory basis for a procedure that was created by Customs administrative practice.

It is your position that with respect to the applicability of ruling letter 200396 after passage of the 1988 act, that Congress intended to abandon this practice because it was not specifically adopted. We reach the opposite conclusion, i.e., the fact that Congress did not specifically reject Customs policy regarding the sale of gasoline by duty-free stores means that Congress did not object to such practice. Thus, in holding that gasoline and diesel fuel may not be sold by duty-free stores, it was proper to follow the precedent established by ruling letter 200396.

Issue 2:

It is also your position that the 1996 amendment rendered ruling letter 200396, and HQ 225287, obsolete by removing the underlying reasoning because, under 1555(b)(6)(B), any gasoline purchased in a duty-free sales enterprise remaining in a vehicle upon its return to the United States can be covered by the personal allowance or under the de minimis provisions of the Tariff Act. We disagree. Congress amended the personal allowance for duty exemptions by Section 29 of the Act of October 17, 1996 (Pub. L. 104-295, 110 Stat. 3535) (Miscellaneous Trade and Technical Corrections Act of 1996). That law amended 19 U.S.C. 1555(b)(c) to provide:

(6)(A) Except as provided in subparagraph(B), merchandise that is purchased in a duty-free sales enterprise is not eligible for exemption from duty under subchapter IV of chapter 98 of the Harmonized Tariff Schedule of the United States if such merchandise is brought bact to the customs territory.

(B)Except in the case of travel involving transit to, from, or through an insular possession of the United States, merchandise described in subparagraph (A) that is purchased by a United States resident shall be eligible for exemption from duty under subheadings

9804.00.65, 9804.00.70, and 9804.00.72 of the Harmonized Tariff Schedule of the United States upon the United States resident's return to the customs territory of the United States, if the resident meets the eligibility requirements for the exemption claimed. Notwithstanding any other provision of law, such merchandise shall be considered to be an article acquired abroad as an incident of the journey from which the resident is returning for purposes of determining eligibility for any such exemption.

The stated purpose of the change in Senate Report 104-393, 17(October 1, 1996) is as follows:

Personal Allowance Duty Exemption for Merchandise Purchased in a Duty-Free Sales Enterprise (Section 29) Current law Subchapter IV of HTS Chapter 98 provides that U.S. residents who travel outside the country for more than 48 hours may bring back up to $400 of merchandise purchased on their trip without paying duties or taxes when they return to the U.S. (Higher limits apply to residents returning from the U.S. insular possessions or from beneficiary countries under either the Caribbean Basin Economic Recovery Act or the Andean Trade Preference Act.) However, section 555(b)(6) of the Tariff Act of 1930 (19 U.S.C. 1555(b)(6)) provides that merchandise purchased in a duty-free sales enterprise in the United States is not eligible for exemption from duty upon the traveler's return to the United States.

Explanation of provision This section amends section 555(b)(6) of the Tariff Act of 1930 to permit U.S. residents who have been outside the United States for at least 48 hours to apply merchandise purchased from a U.S. duty-free store against their personal duty-free allowance. The provision does not apply to residents returning from travel that involves transit to, from, or through a U.S. insular possession (American Samoa, Guam, or the Virgin Islands of the United States).

Reason for change The Committee believes that current law disadvantages U.S. duty-free stores and is inconsistent with the practices of other countries, which allow purchases made in their duty-free shops to be reimported under returning-resident allowances. As under current law, purchases made in U.S. duty-free shops must be made at the beginning of a resident's outbound journey.

The report is silent with respect to HQ 225287 or any other Customs ruling. When Congress intends to overturn or modify a Customs or judicial interpretation, it announces that intention in clear language. For example, section 484A of the Customs and Trade act of 1990 (Act of August 20, 1990, Pub. L. 101-382, 104 Stat. 699) amended 19 U.S.C. 1313 to modify the effect of the ruling issued as C.S.D. 88-1. To make that intention clear, Congress expressly noted that ruling in the Conference Report (H. Rpt. 101-650, 242 (July 30, 1990)). See also S. Rpt. 101-252, 39 (March 22, 1990). Likewise, with respect to the amendment of 19 U.S.C. 1504 in the North American Free Trade Agreement Implementation Act (Act of December 8, 1993, Pub. L. 103-182, 107 Stat. 2057), Congress expressly made clear its intention to overturn the case of Nunn Bush Shoe v. U.S., 784 F. Supp. 892 (CIT 1992) by so stating in H. Rpt. 103-361, Part 1, 139 (November 15, 1993).

In HR 225287, Customs ruled that duty-free gasoline and diesel fuel may not be sold from a duty-free store under 19 U.S.C. 1555(b). The ruling cited Customs determination (as set forth in HQ 200396) and the remarks of Senator Bentsen that the purpose of enacting the legislation was to codify current administrative practice in reaching that decision. A primary administrative concern is the lack of feasible control over bulk materials such as gasoline and diesel fuel for automobiles. As noted in HQ 225287 paragraphs (2)(D) and (8)(G) of 19 U.S.C.

1555(b) contemplate that merchandise sold in a duty-free store be capable of relatively simple, effective controls.

The change with respect to making certain merchandise sold in duty-free store eligible to be included in a returning resident's personal exemption under subheadings 9804.00.65, 9804.00.70 and 9804.00.72, HTSUS (19 U.S.C. 1202) does not eliminate the need for simple, effective administrative controls over such merchandise. The authority to waive the collection of duty under 19 U.S.C. 1321(a) also does not eliminate the need for administrative oversight over such merchandise. Customs remains responsible for determining the eligibility for exemption from duty and for the correct recordation of the entry in import statistics pursuant to 19 U.S.C. 1484. Moreover, the eligibility for a duty exemption does not exempt the imported merchandise from being subject to other customs laws. The exemption from duty depends on the status of the individual and the circumstances regarding the exportation of the goods, the time spent out of the United States, and the frequency of the claims for eligibility. In order to administer those requirements, the need for simple effective controls has not been lessened by the 1996 statutory change. In any event, neither the statutory change itself nor the relevant legislative history shows an intent to modify the existing Customs position.

Finally, the other points raised in your letters were covered by HQ 225287. Your letters do not add any additional points or information so as to require us to reconsider those aspects. We believe that the Customs position on those points is clear.

HOLDING:

Having reviewed our previous decision in light of your written submissions, we do not find the arguments presented as compelling a reversal of HQ 225287. Thus, HQ 225287 is hereby affirmed.

Sincerely,

John A. Durant Director Commercial Rulings Division

Section 1555. Bonded warehouses

(a) Designation; preconditions; bonding requirements; supervision Subject to subsection (b) of this section, buildings or parts of buildings and other enclosures may be designated by the Secretary of the Treasury as bonded warehouses for the storage of imported merchandise entered for warehousing, or taken possession of by the appropriate customs officer, or under seizure, or for the manufacture of merchandise in bond, or for the repacking, sorting, or cleaning of imported merchandise. Such warehouses may be bonded for the storing of such merchandise only as shall belong or be consigned to the owners or proprietors thereof and be known as private bonded warehouses, or for the storage of imported merchandise generally and be known as public bonded warehouses. Before any imported merchandise not finally released from customs custody shall be stored in any such premises, the owner or lessee thereof shall give a bond in such sum and with such sureties as may be approved by the Secretary of the Treasury to secure the Government against any loss or expense connected with or arising from the deposit, storage, or manipulation of merchandise in such warehouse. Except as otherwise provided in this chapter, bonded warehouses shall be used solely for the storage of imported merchandise and shall be placed in charge of a proper officer of the customs, who, together with the proprietor thereof, shall have joint custody of all merchandise stored in the warehouse; and all labor on the merchandise so stored shall be performed by the owner or proprietor of the warehouse, under supervision of the officer of the customs in charge of the same, at the expense of the owner or proprietor. The compensation of such officer of the customs and other customs employees appointed to supervise the receipt of merchandise into any such warehouse and deliveries therefrom shall be reimbursed to the Government by the proprietor of such warehouse.

(b) Duty-free sales enterprises

(1) Duty-free sales enterprises may sell and deliver for export from the customs territory duty-free merchandise in accordance with this subsection and such regulations as the Secretary may prescribe to carry out this subsection.

(2) A duty-free sales enterprise may be located anywhere within –

(A) the same port of entry, as established under section 1 of the Act of August 24, 1912 (37 Stat. 434), from which a purchaser of duty-free merchandise departs the customs territory; or

(B) 25 statute miles from the exit point through which the purchaser of duty-free merchandise will depart the customs territory; or

(C) a port of entry, as established under section 1 of the Act of August 24, 1912 (37 Stat. 434), or within 25 statute miles of a staffed port of entry if reasonable assurance can be provided that duty-free merchandise sold by the enterprise will be exported by individuals departing from the customs territory through an international airport located within the customs territory.

(3) Each duty-free sales enterprise -

(A) shall establish procedures to provide reasonable assurance that duty-free merchandise sold by the enterprise will be exported from the customs territory;

(B) if the duty-free sales enterprise is an airport store, shall establish and enforce, in accordance with such regulations as the Secretary may prescribe, restrictions on the sale of duty-free merchandise to any one individual to personal use quantities;

(C) shall display in prominent places within its place of business notices which state clearly that any duty-free merchandise purchased from the enterprise –

(i) has not been subject to any Federal duty or tax,

(ii) if brought back into the customs territory, must be declared and is subject to Federal duty and tax, and

(iii) is subject to the customs laws and regulation of any foreign country to which it is taken;

(D) shall not be required to mark or otherwise place a distinguishing identifier on individual items of merchandise to indicate that the items were sold by a duty-free sales enterprise, unless the Secretary finds a pattern in which such items are being brought back into the customs territory without declaration;

(E) may unpack merchandise into saleable units after it has been entered for warehouse and placed in a duty-free sales enterprise, without requirement of further permits; and

(F) shall deliver duty-free merchandise –

(i) in the case of a duty-free sales enterprise that is an airport store –

(I) to the purchaser (or a family member or companion traveling with the purchaser) in an area that is within the airport and to which access to passengers is restricted to those departing from the customs territory;

(II) to the purchaser (or a family member or companion traveling with the purchaser) at the exit point of a specific departing flight;

(III) by placing the merchandise within the aircraft on which the purchaser will depart for carriage as passenger baggage; or

(IV) if the duty-free sales enterprise has made a good faith effort to effect delivery for exportation through one of the methods described in subclause (I), (II), or (III) but is unable to do so, by any other reasonable method to effect delivery; or

(ii) in the case of a duty-free sales enterprise that is a border store –

(I) at a merchandise storage location at or beyond the exit point; or

(II) at any location approved by the Secretary before the date of enactment of the Omnibus Trade Act of 1987.

(4) If a State or local or other governmental authority, incident to its jurisdiction over any airport, seaport, or other exit point facility, requires that a concession or other form of approval be obtained from that authority with respect to the operation of a duty-free sales enterprise under which merchandise is delivered to or through such facility for exportation, merchandise incident to such operation may not be withdrawn from a bonded warehouse and transferred to or through such facility unless the operator of the duty-free sales enterprise demonstrates to the Secretary that the concession or approval required for the enterprise has been obtained.

(5) This subsection does not prohibit a duty-free sales enterprise from offering for sale and delivering to, or on behalf of, individuals departing from the customs territory merchandise other than duty-free merchandise, except that such other merchandise may not be stored in a bonded warehouse facility other than a bonded facility used for retail sales.

(6)(A) Except as provided in subparagraph (B), merchandise that is purchased in a duty-free sales enterprise is not eligible for exemption from duty under subchapter IV of chapter 98 of the Harmonized Tariff Schedule of the United States if such merchandise is brought back to the customs territory.

(B) Except in the case of travel involving transit to, from, or through an insular possession of the United States, merchandise described in subparagraph (A) that is purchased by a United States resident shall be eligible for exemption from duty under subheadings 9804.00.65, 9804.00.70, and 9804.00.72 of the

Harmonized Tariff Schedule of the United States upon the United States resident's return to the customs territory of the United States, if the resident meets the eligibility requirements for the exemption claimed. Notwithstanding any other provision of law, such merchandise shall be considered to be an article acquired abroad as an incident of the journey from which the resident is returning, for purposes of determining eligibility for any such exemption.

(7) The Secretary shall by regulation establish a separate class of bonded warehouses for duty-free sales enterprises. Regulations issued to carry out this paragraph shall take into account the unique characteristics of the different types of duty-free sales enterprises.

(8) For purposes of this subsection –

(A) The term "airport store" means a duty-free sales enterprise which delivers merchandise to, or on behalf of, individuals departing from the customs territory from an international airport located within the customs territory.

(B) The term "border store" means a duty-free sales enterprise which delivers merchandise to, or on behalf of, individuals departing from the customs territory through a land or water border by a means of conveyance other than an aircraft.

(C) The term "customs territory" means the customs territory of the United States and foreign trade zones.

(D) The term "duty-free sales enterprise" means a person that sells, for use outside the customs territory, duty-free merchandise that is delivered from a bonded warehouse to an airport or other exit point for exportation by, or on behalf of, individuals departing from the customs territory.

(E) The term "duty-free merchandise" means merchandise sold by a duty-free sales enterprise on which neither Federal duty nor Federal tax has been assessed pending exportation from the customs territory.

(F) The term "exit point" means the area in close proximity to an actual exit for departing from the customs territory including the gate holding area in the case of an airport, but only if there is reasonable assurance that duty-free merchandise delivered in the gate holding area will be exported from the customs territory.

(G) The term "personal use quantities" means quantities that are only suitable for uses other than resale, and includes reasonable quantities for household or family consumption as well as for gifts to others.

(c) International travel merchandise

(1) Definitions For purposes of this section –

(A) the term "international travel merchandise" means duty-free or domestic merchandise which is placed on board aircraft on international flights for sale to passengers, but which is not merchandise incidental to the operation of a duty-free sales enterprise;

(B) the term "staging area" is an area controlled by the proprietor of a bonded warehouse outside of the physical parameters of the bonded warehouse in which manipulation of international travel merchandise in carts occurs;

(C) the term "duty-free merchandise" means merchandise on which the liability for payment of duty or tax imposed by reason of importation has been deferred pending exportation from the customs territory;

(D) the term "manipulation" means the repackaging, cleaning, sorting, or removal from or placement on carts of international travel merchandise; and

(E) the term "cart" means a portable container holding international travel merchandise on an aircraft for exportation.

(2) Bonded warehouse for international travel merchandise The Secretary shall by regulation establish a separate class of bonded warehouse for the storage and manipulation of international travel merchandise pending its placement on board aircraft departing for foreign destinations.

(3) Rules for treatment of international travel merchandise and bonded warehouses and staging areas

(A) The proprietor of a bonded warehouse established for the storage and manipulation of international travel merchandise shall give a bond in such sum and with such sureties as may be approved by the Secretary of the Treasury to secure the Government against any loss or expense connected with or arising from the deposit, storage, or manipulation of merchandise in such warehouse. The warehouse proprietor's bond shall also secure the manipulation of international travel merchandise in a staging area.

(B) A transfer of liability from the international carrier to the warehouse proprietor occurs when the carrier assigns custody of international travel merchandise to the warehouse proprietor for purposes of entry into warehouse or for manipulation in the staging area.

(C) A transfer of liability from the warehouse proprietor to the international carrier occurs when the bonded warehouse proprietor assigns custody of international travel merchandise to the carrier.

(D) The Secretary is authorized to promulgate regulations to require the proprietor and the international carrier to keep records of the disposition of any cart brought into the United States and all merchandise on such cart.

Section 1557. Entry for warehouse

(a) Withdrawal of merchandise; time; payment of charges

(1) Any merchandise subject to duty (including international travel merchandise), with the exception of perishable articles and explosive substances other than firecrackers, may be entered for warehousing and be deposited in a bonded warehouse at the expense and risk of the owner (FOOTNOTE 1) purchaser, importer, or consignee. Such merchandise may be withdrawn, at any time within 5 years from the date of importation, for consumption upon payment of the duties and charges accruing thereon at the rate of duty imposed by law upon such merchandise at the date of withdrawal; or may be withdrawn for exportation or for transportation and exportation to a foreign country, or for shipment or for transportation and shipment to the Virgin Islands, American Samoa, Wake Island, Midway Islands, Kingman Reef, Johnston Island, or the island of Guam, without the payment of duties thereon, or for transportation and rewarehousing at another port or elsewhere, or for transfer to another bonded warehouse at the same port; except that - (FOOTNOTE 1) So in original. Probably should be followed by a comma.

(A) the total period of time for which such merchandise may remain in bonded warehouse shall not exceed 5 years from the date of importation; and

(B) turbine fuel may be withdrawn for use under section 1309 of this title without the payment of duty if an amount equal to the quantity of fuel withdrawn is shown to be used within 30 days after the day of withdrawal, but duties (together with interest payable from the date of the withdrawal at the rate of interest established under section 6621 of title 26) shall be deposited by the 40th day after the day of withdrawal on fuel that was withdrawn in excess of the quantity shown to have been so used during such 30-day period.

(2) Merchandise upon which the duties have been paid and which shall have remained continuously in bonded warehouse or otherwise in the custody and under the control of customs officers, may be entered or withdrawn at any time within 5 years after the date of importation for exportation or for transportation and exportation to a foreign country, or for shipment or for transportation and shipment to the Virgin Islands, American Samoa, Wake Island, Midway Islands, Kingman Reef, Johnston Island, or the island of Guam, under such regulations as the Secretary of the Treasury shall prescribe, and upon such entry or withdrawal, and exportation or shipment, the duties thereon shall be refunded.

(b) Transferal of right of withdrawal

The right to withdraw any merchandise entered in accordance with subsection (a) of this section for the purposes specified in such subsection may be transferred upon compliance with regulations prescribed by the Secretary of the Treasury and upon the filing by the transferee of a bond in such amount and containing such conditions as the Secretary of the Treasury shall prescribe. The bond shall include an obligation to pay, with respect to the merchandise the subject of the transfer, all unpaid regular, increased, and additional duties, all unpaid taxes imposed upon or by reason of importation, and all unpaid charges and exactions. Such transfers shall be irrevocable, shall relieve the transferor from all customs liability with respect to obligations assumed by the transferee under the bond herein provided for, and shall confer upon the transferee all rights to the privileges provided for in this section and in sections 1562 and 1563 of this title which were vested in the transferor prior to the transfer. The transferee shall also have the right to receive all lawful refunds of money paid by him to the United States with respect to the merchandise the subject of the transfer, and shall have the right to file a protest under section 1514 of this title to the same extent that such right would have been available to the transferor. Notice of liquidation shall be given to the transferee in the form and manner prescribed by the Secretary of the Treasury. A transferee may further transfer the right to withdraw merchandise, subject to the provisions of this subsection relating to original transfers.

(c) Destruction of merchandise at request of consignee

Merchandise entered under bond, under any provision of law, may, upon payment of all charges other than duty on the merchandise, be destroyed, at the request and at the expense of the consignee, within the bonded period under customs supervision, in lieu of exportation, and upon such destruction the entry of such merchandise shall be liquidated without payment of duty and any duties collected shall be refunded.

(d) Withdrawal before payment

Merchandise may be withdrawn for consumption without the payment of the duty thereon if the importer of record or transferee is permitted to pay duty at a later time pursuant to regulations prescribed by the Secretary under section 1505 of this title.

Section 4081. Imposition of tax

(a) Tax imposed

(1) Tax on removal, entry, or sale

(A) In general

There is hereby imposed a tax at the rate specified in paragraph (2) on –

(i) the removal of a taxable fuel from any refinery,

(ii) the removal of a taxable fuel from any terminal,

(iii) the entry into the United States of any taxable fuel for consumption, use, or warehousing, and

(iv) the sale of a taxable fuel to any person who is not registered under section 4101 unless there was a prior taxable removal or entry of such fuel under clause (i), (ii), or (iii).

(B) Exemption for bulk transfers to registered terminals or refineries

The tax imposed by this paragraph shall not apply to any removal or entry of a taxable fuel transferred in bulk to a terminal or refinery if the person removing or entering the taxable fuel and the operator of such terminal or refinery are registered under section 4101.

(2) Rates of tax

(A) In general

The rate of the tax imposed by this section is –

(i) in the case of gasoline other than aviation gasoline, 18.3 cents per gallon,

(ii) in the case of aviation gasoline, 19.3 cents per gallon, and

(iii) in the case of diesel fuel or kerosene, 24.3 cents per gallon.

(B) Leaking Underground Storage Tank Trust Fund tax

The rates of tax specified in subparagraph (A) shall each be increased by 0.1 cent per gallon. The increase in tax under this subparagraph shall in this title be referred to as the Leaking Underground Storage Tank Trust Fund financing rate.

(b) Treatment of removal or subsequent sale by blender

(1) In general

There is hereby imposed a tax at the rate determined under subsection (a) on taxable fuel removed or sold by the blender thereof.

(2) Credit for tax previously paid If –

(A) tax is imposed on the removal or sale of a taxable fuel by reason of paragraph (1), and (B) the blender establishes the amount of the tax paid with respect to such fuel by reason of subsection (a), the amount of the tax so paid shall be allowed as a credit against the tax imposed by reason of paragraph (1).

(c) Taxable fuels mixed with alcohol Under regulations prescribed by the Secretary –

(1) In general

The rate of tax under subsection (a) shall be the alcohol mixture rate in the case of the removal or entry of any qualified alcohol mixture.

(2) Tax prior to mixing

(A) In general

In the case of the removal or entry of any taxable fuel for use in producing at the time of such removal or entry a qualified alcohol mixture, the rate of tax under subsection (a) shall be the applicable fraction of the alcohol mixture rate. Subject to such terms and conditions as the Secretary may prescribe (including the application of section 4101), the treatment under the preceding sentence also shall apply to use in producing a qualified alcohol mixture after the time of such removal or entry.

(B) Applicable fraction

For purposes of subparagraph (A), the applicable fraction is -

(i) in the case of a qualified alcohol mixture which contains gasoline, the fraction the numerator of which is 10 and the denominator of which is -

(I) 9 in the case of 10 percent gasohol,

(II) 9.23 in the case of 7.7 percent gasohol, and

(III) 9.43 in the case of 5.7 percent gasohol, and

(ii) in the case of a qualified alcohol mixture which does not contain gasoline, 10/9.

(3) Alcohol; qualified alcohol mixture For purposes of this subsection –

(A) Alcohol

The term "alcohol" includes methanol and ethanol but does not include alcohol produced from petroleum, natural gas, or coal (including peat). Such term does not include alcohol with a proof of less than 190 (determined without regard to any added denaturants).

(B) Qualified alcohol mixture

The term "qualified alcohol mixture" means –

(i) any mixture of gasoline with alcohol if at least 5.7 percent of such mixture is alcohol, and

(ii) any mixture of diesel fuel with alcohol if at least 10 percent of such mixture is alcohol.

(4) Alcohol mixture rates for gasoline mixtures For purposes of this subsection –

(A) General rules

i) Mixtures containing ethanol Except as provided in clause (ii), in the case of a qualified alcohol mixture which contains gasoline, the alcohol mixture rate is the excess of the rate which would (but for this paragraph) be determined under subsection (a) over -

(I) in the case of 10 percent gasohol, the applicable blender rate (as defined in section 4041(b)(2)(C)) per gallon,

(II) in the case of 7.7 percent gasohol, the number of cents per gallon equal to 77 percent of such applicable blender rate, and

(III) in the case of 5.7 percent gasohol, the number of cents per gallon equal to 57 percent of such applicable blender rate.

(ii) Mixtures not containing ethanol

In the case of a qualified alcohol mixture which contains gasoline and none of the alcohol in which consists of ethanol, the alcohol mixture rate is the excess of the rate which would (but for this paragraph) be determined under subsection (a) over –

(I) in the case of 10 percent gasohol, 6 cents per gallon,

(II) in the case of 7.7 percent gasohol, 4.62 cents per gallon, and

(III) in the case of 5.7 percent gasohol, 3.42 cents per gallon.

(B) 10 percent gasohol

The term "10 percent gasohol" means any mixture of gasoline with alcohol if at least 10 percent of such mixture is alcohol.

(C) 7.7 percent gasohol

The term "7.7 percent gasohol" means any mixture of gasoline with alcohol if at least 7.7 percent, but not 10 percent or more, of such mixture is alcohol.

(D) 5.7 percent gasohol

The term "5.7 percent gasohol" means any mixture of gasoline with alcohol if at least 5.7 percent, but not 7.7 percent or more, of such mixture is alcohol.

(5) Alcohol mixture rate for diesel fuel mixtures

The alcohol mixture rate for a qualified alcohol mixture which does not contain gasoline is the excess of the rate which would (but for this paragraph) be determined under subsection (a) over the applicable blender rate (as defined in section 4041(b)(2)(C)) per gallon (6 cents per gallon in the case of a qualified alcohol mixture none of the alcohol in which consists of ethanol).

(6) Limitation

In no event shall any alcohol mixture rate determined under this subsection be less than 4.3 cents per gallon.

(7) Later separation of fuel from qualified alcohol mixture

If any person separates the taxable fuel from a qualified alcohol mixture on which tax was imposed under subsection (a) at a rate determined under paragraph (1) or (2) (or with respect to which a credit or payment was allowed or made by reason of section 6427(f)(1)), such person shall be treated as the refiner of such taxable fuel. The amount of tax imposed on any removal of such fuel by such person shall be reduced by the amount of tax imposed (and not credited or refunded) on any prior removal or entry of such fuel.

(8) Termination

Paragraphs (1) and (2) shall not apply to any removal, entry, or sale after September 30, 2007.

(d) Termination

(1) In general

The rates of tax specified in clauses (i) and (iii) of subsection (a)(2)(A) shall be 4.3 cents per gallon after September 30, 2005.

(2) Aviation gasoline

The rate of tax specified in subsection (a)(2)(A)(ii) shall be 4.3 cents per gallon –

(A) after December 31, 1996, and before the date which is 7 days after the date of the enactment of the Airport and Airway Trust Fund Tax Reinstatement Act of 1997, and

(B) after September 30, 2007.

(3) Leaking Underground Storage Tank Trust Fund financing rate

The Leaking Underground Storage Tank Trust Fund financing rate under subsection (a)(2) shall apply after September 30, 1997, and before April 1, 2005.

(e) Refunds in certain cases

Under regulations prescribed by the Secretary, if any person who paid the tax imposed by this section with respect to any taxable fuel establishes to the satisfaction of the Secretary that a prior tax was paid (and not credited or refunded) with respect to such taxable fuel, then an amount equal to the tax paid by such person shall be allowed as a refund (without interest) to such person in the same manner as if it were an overpayment of tax imposed by this section.

Code of Federal Regulations

From the U.S. Government Printing Office via GPO Access

TITLE 19--CUSTOMS DUTIES

CHAPTER I--UNITED STATES CUSTOMS SERVICE, DEPARTMENT OF THE TREASURY

PART 19--CUSTOMS WAREHOUSES, CONTAINER STATIONS AND CONTROL OF MERCHANDISE THEREIN--Table of Contents

Sec. 19.35 Establishment of duty-free stores (Class 9 warehouses).

(a) General. A class 9 warehouse (duty-free store) may be established for exportation of conditionally duty-free merchandise by individuals departing the Customs territory, inclusive of foreign trade zones, by aircraft, vessel, or departing directly by vehicle or on foot to a contiguous country. Such articles must accompany the individual on his person or in the same aircraft, vessel, or vehicle in which the individual departs. ``Conditionally duty-free merchandise'' means merchandise sold by a duty-free store on which duties and/or internal revenue taxes (where applicable) have not been paid. Except insofar as the provisions of this section and Secs. 19.36-19.39 are more specific, the procedures for bonded warehouses apply to duty-free stores (Class 9 warehouses).

(b) Location. A duty-free store (class 9 warehouse) may be established or located only:

(1) Within the same port of entry from which a purchaser of duty- free store merchandise departs the Customs territory;

(2) Within 25 statute miles from the exit point through which a purchaser of duty-free store merchandise departs the Customs territory; or

(3) In the case of an airport store, within any staffed port of entry, or within 25 statute miles from any staffed port of entry.

(c) Integrated locations. A Class 9 warehouse with multiple noncontiguous sales and crib locations (see Sec. 19.37(a) of this part) containing conditionally duty-free merchandise and requested by the proprietor may be treated by Customs as one location if:

(1) The proprietor can provide Customs upon demand with the proper on-hand balance of each inventory item in each storage location, sales room, crib, mobile crib, delivery cart, or other conveyance or noncontiguous location; and

(2) The recordkeeping system is centralized up to the point where a sale is made so as to automatically reduce the sale quantity by location from centralized inventory or inventory records must be updated no less frequently than at the end of each business day to reflect that day's activity.

(d) Exit point. The exit point referred to in paragraph (b) of this section means an area in close proximity to an actual exit for departing from the Customs territory, including the gate holding area in the case of an airport, but only if there is reasonable assurance that conditionally duty-free merchandise delivered in the gate holding area will be exported from the Customs territory. The exit point in the case of a land border or seaport duty-free store is the point at which a departing individual has no practical alternative to continuing on to a foreign country or to returning to Customs territory by passing through a U.S. Customs inspection facility. The port director's decision as to what constitutes the exit point or reasonable assurance of exportation in a given situation is final.

(e) Notice to customers. Class 9 warehouse proprietors shall display in prominent places where they will be noticed and read by customers signs which state clearly that any conditionally duty-free merchandise purchased from the store:

(1) Has not been subjected to any U.S. Federal duty or tax;

(2) If brought back to the United States must be declared and is subject to U.S. Federal duty and tax with personal exemption; and,

(3) Is subject to the customs laws and regulations, including possible duties and taxes, of any foreign country to which it is taken.

(f) Security of sales rooms and cribs. The physical and procedural security requirements of Sec. 19.4(b)(6) of this part shall be applied to the security of the sales rooms and cribs by the port director. The proprietor shall establish procedures to safeguard the merchandise so as to accommodate the movement of purchasers and prospective purchasers of conditionally duty-free merchandise contained in duty-free sales rooms and cribs.

(g) Approval of governmental authority. If a state or local or other governmental authority, incident to its jurisdiction over any airport, seaport, or other exit point facility, requires that a concession or other form of approval be obtained from that authority with respect to the operation of a duty-free store under which merchandise is delivered to or through such facility for exportation, merchandise incident to such operation may not be withdrawn for exportation and transferred to or through such facility unless the operator of the duty-free store demonstrates to the port director that the concession or approval required for the enterprise has been obtained.

CITE: 19CFR19.36

TITLE 19--CUSTOMS DUTIES

CHAPTER I--UNITED STATES CUSTOMS SERVICE, DEPARTMENT OF THE TREASURY

PART 19--CUSTOMS WAREHOUSES, CONTAINER STATIONS AND CONTROL OF MERCHANDISE THEREIN--Table of Contents

Sec. 19.36 Requirements for duty-free store operations.

(a) Withdrawals. Merchandise withdrawn under the sales ticket procedure in Sec. 144.37(h) of this chapter may be delivered only to individuals departing from the Customs territory for exportation or to persons and organizations for use as specified in subpart I, part 148, of this chapter. Withdrawals of other kinds may be made from Class 9 warehouses, but only through separate withdrawals (or withdrawals under blanket permit for vessel or aircraft supplies) under an approved permit of the port director as provided in Sec. 144.39 of this chapter.

(b) Procedures required. Each duty-free store shall establish, maintain, and follow written procedures to provide reasonable assurance to the port director that conditionally duty-free merchandise purchased therein will be exported from the Customs territory. A copy of any change in the procedure will be provided to the port director before it is implemented. However, receipt by Customs of the procedures of any change thereto shall not be construed as approval by Customs of the procedures. The port director is responsible for ensuring that each enterprise has established guidelines with Customs and is complying with those guidelines, giving assurance that proper supervision exists when delivery is made to the purchaser at or before the exit point. The port director may at any time require any change in the procedures deemed necessary for assurance of exportation.

(c) Personal-use restrictions. Any duty-free store which delivers conditionally duty-free merchandise to purchasers at an airport exit point shall establish, maintain, and enforce written restrictions on the sale of conditionally duty-free merchandise to any one individual to personal-use quantities. Personal-use quantities means quantities that are only suitable for uses other than resale, and includes reasonable quantities for household or family consumption as well as for gifts to others. Proprietors will not knowingly sell or deliver conditionally duty-free merchandise in any quantity to any individual for the purpose of resale. A copy of the restrictions and of any change thereto shall be provided to the port director prior to implementation. However, receipt of the written restrictions by Customs shall not be construed as approval by Customs of the restrictions. The port director may require any change in the restrictions deemed necessary to conform to the personal-use quantity restriction of this section.

(d) Reimported merchandise. Merchandise purchased in a duty-free store is not eligible for exemption from duty, or tax where applicable, under chapter 98, subchapter IV, Harmonized Tariff Schedule, if it is brought back to the United States after exportation. To enforce this restriction, the port director may require the proprietor to mark or otherwise place a distinguishing identifier on individual items of merchandise to indicate the items were sold in a U.S. duty-free store, if a pattern is disclosed in which such items are being brought back to the United States without declaration. A pattern of undeclared reimportations means a number of instances over a period of time and not isolated instances of unrelated violations. Any such marking required by the port director will be inconspicuous to the purchaser and will not detract from the value of the merchandise. The marking requirement will be limited to the items or types of merchandise noted in the pattern, and will not be extended to all merchandise of the responsible store proprietor unless all or most items are part of the pattern.

(e) Merchandise eligible for warehousing. Only conditionally duty-free merchandise may be placed in a bonded storage area of a Class 9 warehouse. However, domestic merchandise and merchandise which was previously entered or withdrawn for consumption, may be brought into the bonded sales or crib area of a Class 9 warehouse for display and sale, and in the case of a crib, for delivery to purchasers. However, such merchandise must be either identified or marked "DUTY-PAID" or "U.S.-ORIGIN", or similar markings, as applicable, so that Customs officers can easily distinguish conditionally duty-free merchandise from other merchandise in the sales or crib area.

(f) Sale of merchandise. Conditionally duty-free merchandise for exportation at airport or seaport exit points may be sold and delivered only to purchasers who display valid tickets, or in the case of chartered or for-hire flights that have not issued tickets, other proof of impending departure from the Customs territory, and to crewmembers who have been engaged for a flight or voyage departing directly from the Customs territory with no intermediate stops in the U.S.

(g) Inventory procedure. Duty-free store proprietors shall maintain, at the duty-free store or at another location approved by the port director, a current inventory separately for each storage area, crib, and sales area containing conditionally duty-free merchandise by warehouse entry, or by unique identifier where permitted by the port director. Proprietors shall assure that Customs has ready access to those records, and that the records are stored in such a way as to keep transactions of multiple facilities separated. The inventory shall be reconcilable with the accounting and inventory records and the permit file folder requirements of Sec. 19.12 (d), (e) and (f) of this part. Proprietors are subject also to the recordkeeping requirements of other paragraphs of Sec. 19.12, as well as those of Secs. 19.6(d), 19.37(d), 19.39(d) of this part, and 144.37(h)(3) of this chapter.

United States Customs Service (U.S.C.S.)

General Notices

PROPOSED REVOCATION OF LETTER RELATING TO GASOLINE AND DIESEL FUEL FROM CLASS 9 CUSTOMS BONDED WAREHOUSE ALSO KNOWN AS A DUTY-FREE SHOP

June 1, 2001

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Revocation of letter relating to gasoline and diesel fuel from a class 9 Customs bonded warehouse also known as a duty-free shop.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 USC 1625(c)) this notice advises interested parties that Customs intends to revoke a letter issued by the Port Director at Detroit pertaining to the entry into a class 9 Customs bonded warehouse and the sale of gasoline and diesel fuel from such a warehouse.

DATE: Comments must be received on or before July 20, 2001.

ADDRESS: Written comments (preferably in triplicate) are to be addressed to U.S. Customs Service, Office of Regulations and Rulings, 1300 Pennsylvania Avenue, NW, Washington, D.C. 20229.

FOR FURTHER INFORMATION CONTACT: William G. Rosoff, Chief, Duty and Refund Determination Branch, (202) 927-2077.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On December 8, 1993, Title VI, (Customs Modernization), of the North American Free Trade Agreement Implementation Act (Pub.L. 103-182, 107 Stat. 2057), (hereinafter "Title VI"), became effective. Title VI amended many sections of the Tariff Act of 1930, as amended and related laws. Two new concepts which emerge from the law are "informed compliance" and "shared responsibility." These concepts are premised on the idea that in order to maximize voluntary compliance with Customs laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations. Accordingly, the law imposes a greater obligation on Customs to provide the public with improved information concerning the trade community's responsibilities and rights under the Customs and related laws. In addition, both the trade and Customs share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended, (19 U.S.C. section 1484) the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise and provide any other information necessary to enable Customs to properly assess duties, collect accurate statistics and determine whether any other applicable legal requirement is met.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 USC 1625(c)(1), this notice advises interested parties that Customs intends to revoke a letter issued by the Port Director at Detroit pertaining to the entry into, and sale from, a class 9 Customs bonded warehouse of gasoline and diesel fuel. Although in this notice Customs is specifically referring to one letter, this notice covers any other letter or ruling relating to the eligibility for entry into, and sale from, a class 9 Customs bonded warehouse which may exist but not have been specifically identified. Customs has undertaken reasonable efforts to search existing databases for rulings in addition to the one identified. No further rulings have been found. Any party who has received an interpretive ruling or decision (i.e., ruling letter, internal advice memorandum or decision or protest review decision) on the merchandise subject to this notice should advise Customs during this period. On September 5, 2000, the Port Director, Detroit, issued a letter to Ammex, Inc., granting its request to expand its operation of a class 9 Customs warehouse (duty-free store) to include gasoline and diesel fuel tanks to permit, as described by Ammex in a September 1, 2000 letter to Inspector Jim Blaine, the sale of "duty free fuel." The Port Director issued the letter to implement the decision of the Court of International Trade in Ammex Inc., v. U.S., 115 F.Supp.2d 1269 (2000), which declared HQ 227385 (February 12, 1998) to be contrary to law. In HQ 227385, Customs had reconsidered an earlier ruling, HQ 225287 (June 7, 1994), that concerned gasoline and diesel fuel which had been identified by the party requesting the ruling as duty-free merchandise. Accordingly, in both HQ 227385 and 225287, Customs accepted the requestor's assertion that the merchandise under consideration was duty-free but, for reasons unrelated to its eligibility for duty-free status, determined that such merchandise could not be sold as duty-free merchandise from a class 9 bonded warehouse. The Court of International Trade held that HQ 227385 violated 19 USC 1557(a)(1), which permits "any merchandise subject to duty, with the exception of perishable articles and explosive substances" to be entered and withdrawn (for exportation) from a bonded warehouse.

The statute governing the operation of duty-free stores, 19 USC 1555(b)(8)(E), defines duty-free merchandise as merchandise on which neither Federal duty nor Federal tax has been assessed pending exportation. Customs regulations implementing 19 USC 1555(b) provides that "only conditionally duty-free merchandise may be placed in a bonded storage area of a Class 9 warehouse" and defines "conditionally duty-free merchandise" as "merchandise sold by a duty-free store on which duties and/or internal revenue taxes (where applicable) have not been paid." 19 CFR 19.35(a) and 19.36(e). In Ammex, Inc. v. U.S., the CIT noted approvingly that there is not conflict between 19 USC 1557(a)(1) and 19 CFR 19.35(a) and 19.36(e). 115 F.Supp.2d 1275, n.9.

The Internal Revenue Service has informed the Customs Service that 26 USC 4081 imposes a tax upon entry into the United States of any taxable fuel for consumption, use, or warehousing. Taxable fuel is defined by 26 USC 4083 and includes gasoline and diesel fuel. By regulation, 26 CFR 48.4081-1(a), entry for purposes of 26 USC 4081 occurs when taxable fuel is brought into the United States and applicable Customs law requires that the taxable fuel be entered for consumption, use, or warehousing. By statute, 19 USC 1484, generally the entry of all imported merchandise, which necessarily includes imported gasoline and diesel fuel, is required. The entry for warehouse is further governed by 19 USC 1557. Consequently, any fuel subject to a tax when warehoused under 26 USC 4081 and the implementing Internal Revenue Service regulations cannot qualify as duty-free fuel and, therefore, cannot be entered into a class 9 warehouse. Because only fuel on which neither duty nor tax has been assessed can qualify as duty-free fuel in conformity with 19 USC 1555(b)(8)(E), the Customs Service intends to revoke the Port Director's letter of September 5, 2000.

Dated: June 1, 2001.

John Durant
Director
Commercial Rulings Division

[ATTACHMENT]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, June 1, 2001.
MR. FRANCOIS LEVESQUE, PRESIDENT
AMMEX DETROIT DUTY FREE
3400 W. Fort Street
Detroit, Michigan 48216
DEAR MR. LEVESQUE;

This letter is to notify you that the letter of the Port

Director dated September 5, 2000, which was in response to your letter of September 1, 2000, to the extent that it authorized the entry into your class 9 Customs bonded warehouse of other than duty-free fuel, is revoked.

The statute authorizing the entry into class 9 Customs bonded warehouses, 19 USC 1555(b), provides for the entry only of duty-free merchandise. Paragraph (8)(E) of that statute defines duty-free merchandise to mean merchandise sold by a duty-free sales enterprise on which neither Federal duty nor Federal tax has been assessed. It has been brought to Customs attention that the imported gasoline and diesel fuel in issue here was assessed with a tax under 26 USC 4081, as implemented by 26 CFR 48.4081. Consequently, that fuel does not meet the statutory definition of duty-free merchandise is not eligible for entry into a class 9 Customs bonded warehouse. However, fuel that is assessed Federal tax and, therefore, is within the statutory definition of merchandise other than duty-free merchandise may be sold to individuals departing the U.S., but not as duty-free merchandise.

John Durant
Director
Commercial Rulings Division

United States Customs Service (U.S.C.S.)

General Notices

REVOCATION OF RULING LETTER AND TREATMENT RELATING TO GASOLINE & DIESELFUEL IN A CLASS 9 CUSTOMS BONDED WAREHOUSE

November 1, 2001

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of revocation of ruling letter and treatment relating to gasoline & diesel fuel in a class 9 Customs bonded warehouse.

SUMMARY: Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103-182, 107 Stat. 2057), this notice advises interested parties that Customs is revoking a ruling letter pertaining to gasoline and diesel fuel from a class 9 bonded warehouses and revoking any treatment previously accorded by the Customs Service to substantially identical transactions. Notice of the proposed revocation was published on June 20, 2001, in Volume 35, Number 25, of the CUSTOMS BULLETIN. Two comments were received in response to this notice.

EFFECTIVE DATE: Merchandise entered or withdrawn from warehouse for consumption on or after January 21, 2002.

FOR FURTHER INFORMATION CONTACT: William G. Rosoff, Duty and Refund Branch, (202) 927-2265.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On December 8, 1993, Title VI (Customs Modernization), of the North American Free Trade Agreement Implementation Act (Pub. L. 103-182, 107 Stat. 2057) (hereinafter "Title VI"), became effective. Title VI amended many sections of the Tariff Act of 1930, as amended, and related laws. Two new concepts, which emerge from the law, are "informed compliance" and "shared responsibility." These concepts are premised on the idea that in order to maximize voluntary compliance with Customs laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations. Accordingly, the law imposes a greater obligation on Customs to provide the public with improved information concerning the trade community's responsibilities and rights under the Customs and related laws. In addition, both the trade and Customs share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended (19 U.S.C. §1484), the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and to provide any other information necessary to enable Customs to properly assess duties, collect accurate statistics and determine whether any other applicable legal requirement is met. Pursuant to section 625(c)(1), Tariff Act of 1930 (19

U.S.C. 1625(c)(1)), as amended by section 623 of Title VI, a notice was published on June 20, 2001, in the CUSTOMS BULLETIN, Volume 35, Number 25, proposing to revoke Detroit Port Letter, dated September 5, 2000, pertaining to the use of class 9 Customs bonded warehouses for duty-free fuel. Two Comments were received in reply to the notice. This notice informs interested parties that Customs intends to revoke a letter issued by the Port Director in Detroit pertaining to the entry into, and sale from, a class 9 Customs bonded warehouse (duty-free store) of gasoline and diesel fuel. Although in this notice Customs is specifically referring to one letter, this notice covers any other letter or ruling relating to the eligibility for entry into, and sale from, a class 9 Customs bonded warehouse which may exist but has not been specifically identified. Two comments were received in response to this notice. On September 5, 2000, the Port Director, Detroit, issued a letter to Ammex, Inc., granting its request to expand its operation of a class 9 Customs warehouse to include gasoline and diesel fuel tanks to permit, as described by Ammex in a September 1, 2000 letter to Inspector Jim Blaine, the sale of "duty free fuel." The Port Director issued the letter to implement the decision of the Court of International Trade in Ammex Inc., v. U.S., 116 F. Supp.2d 1269 (Ct.. Int'l Trade 2000), which declared HQ 227385 (February 12, 1998) to be contrary to law. In HQ 227385, Customs had reconsidered an earlier ruling, HQ 225287 (June 7, 1994), that concerned gasoline and diesel fuel which had been identified by the party requesting the ruling as duty-free merchandise. Accordingly, in both HQ 227385 and 225287, Customs accepted the requestor's assertion that the merchandise under consideration was duty-free but, for reasons unrelated to its eligibility for duty-free status, determined that such merchandise could not be sold as duty-free merchandise from a class 9 bonded warehouse. The Court of International Trade held that HQ 227385 violated 19 U.S.C. 1557(a)(1), which permits "any merchandise subject to duty, with the exception of perishable articles and explosive substances" to be entered and withdrawn (for exportation) from a bonded warehouse. The statute governing the operation of duty-free stores, 19 U.S.C. 1555(b)(8)(1), permits operations of duty-free stores to sell and deliver for exportation "duty-free merchandise." That statute defines duty-free merchandise as merchandise on which neither Federal duty nor Federal tax has been assessed pending exportation. 19 U.S.C. 1555(b)(8)(E). Customs regulations implementing 19 U.S.C. 1555(b) provide that "only conditionally duty-free merchandise may be placed on a bonded storage area of a Class 9 warehouse" and define "conditionally duty-free merchandise" as "merchandise sold by a duty-free store on which duties and/or internal revenue taxes (where applicable) have not been paid." 19 CFR 19.35(a) and 19.36(e). In Ammex, Inc. v. U.S., the CIT noted approvingly that there is no conflict between 19 U.S.C. 1557(a)(1) and 19 CFR 19.35(a) and 19.36(e). 116 F. Supp.2d at 1275, n.9. The Internal Revenue Service has informed the Customs Service that 26 USC 4081 imposes a tax upon entry into the United States of any taxable fuel for consumption, use, or warehousing. Taxable fuel is defined by 26 U.S.C. 4083 to include gasoline and diesel fuel. By IRS regulation, 26 CFR 48.4081-1(a), entry for purposes of 26 U.S.C. 4081 occurs when taxable fuel is brought into the United States and applicable Customs law requires that the taxable fuel be entered for consumption, use, or warehousing. Generally all imported merchandise, which necessarily includes imported gasoline and diesel fuel is required to be entered. Under 19 U.S.C. 1557 the entry of merchandise for warehousing is permitted. Consequently, any fuel subject to a tax when entered for warehousing under 26 U.S.C. 4081 and the implementing Internal Revenue Service regulations cannot qualify as duty-free fuel and, therefore, cannot be entered into a class 9 warehouse pursuant to 19 U.S.C. 1555(b)(1) and the applicable Customs Regulations.

Because only fuel on which neither duty nor tax has been assessed can qualify as duty-free fuel in conformity with 19 U.S.C. 1555(b)(8)(E), the Customs Service intends to revoke the Port Director's letter of September 5, 2000, to the extent that it would allow the sale under 18 U.S.C. 1555(b)(1) of fuel for which a tax was assessed under 26 U.S.C. 4081. As stated in the proposed notice, this revocation will cover any rulings on this issue which may exist but have not been specifically identified. Any party who has received an interpretive ruling or decision (i.e., ruling letter, internal advice memorandum or decision or protest review decision) on the issue subject to this notice, should have advised Customs during the notice period.

Two comments were received--one from Ammex, Inc. and one from Ram Control. The first comment, from Ammex, Inc., made several arguments against the revocation. The commenter asserted that no federal tax has been assessed on gasoline and diesel fuel sold from Ammex's duty-free store and argued that 26 U.S.C.

6103(1)(14) prohibits Customs from accessing such tax information from the IRS. However, IRS has not provided Customs with any information from Ammex's tax returns; it has merely informed Customs that 26 U.S.C. 4081 imposes a tax upon entry of gasoline and diesel fuel. This decision does not determine whether Ammex actually paid the tax. The only determination is that fuel which is assessed a tax under 26 U.S.C. 4081 cannot qualify for entry under 19 U.S.C. 1555(b)(1). The commenter also argued that Customs cannot make one blanket ruling that includes all importers of gasoline and diesel petroleum that paid taxes based on 26 U.S.C. 4801, but rather that Customs must reply to each individual case as it arises. According to 19 CFR 177.9(b)

> The application of a ruling letter by a Customs Service field office to the transaction to which it is purported to relate is subject to the verification of the facts incorporated in the ruling letter, a comparison of the transaction described therein to the actual transaction, and the satisfaction of any condition on which the ruling was based. If, in the opinion of any Customs Service field office by whom the transaction is under consideration or review, the ruling letter should be modified or revoked, the finding and recommendations of that office will be forwarded to Headquarters Office for consideration, as provided in 177.11(b)(1)(i), prior to any final disposition with respect to the transaction by that office. Otherwise, if the transaction described in the ruling letter and the actual transaction are the same, and any and all conditions set forth in the ruling letter have been satisfied, the ruling will be applied to the transaction. (emphasis added).

Therefore, if a person believes that they have a unique situation where all the conditions set forth in the existing ruling letter do not apply, then that person can file for a specific and distinguished ruling from Customs by following the procedure explained in 19 CFR 177.2. The commenter also makes the argument that the application of 26 U.S.C. 4081 to gasoline and diesel fuel entered into a class 9 warehouse violates the Export Clause of the U.S. Constitution because all merchandise sold by a duty- free store must be exported. Customs disagrees. The Export Clause provides that "No Tax or Duty shall be laid on Articles exported from any State". U.S. Const., art I, 9,cl 5. However, the plain language of 26 U.S.C. 4081 imposes an excise tax on "the entry into the United States of any taxable fuel for consumption, use or warehousing * * *;" not on the export of such taxable fuel and Article I, Section 8, Clause 1 of the Constitution clearly grants Congress the power "lay and collect Taxes, Duties, Imposts and Excises. As noted above, fuel on which a tax is assessed under 26 U.S.C. 4081 does not meet the definition of duty-free merchandise eligible to be entered into a class 9 warehouse; whether the tax is assessed properly is not an issue for the Customs Service to determine. The commenter also states that merchandise sold by a duty-free enterprise, by definition and law, is exported. Customs disagrees. The statute provides for different treatment of duty-free merchandise and other than duty-free merchandise. Merchandise that is other than duty-free merchandise is not eligible to be entered into the bonded warehouse itself. That merchandise can only be stored in the retail facility rather than within the bonded warehouse itself. That statutory restriction has been implemented by section 19.36(e) of the

Customs Regulations. Since that merchandise was not eligible to be entered for warehousing under 19 USC 1557(a), that statute can't impose an export requirement. On the contrary, merchandise other than duty-free merchandise is required to be kept apart from duty-free merchandise and marked appropriately as duty-paid or US origin goods. There is no requirement imposed by statute, regulation or logic that such merchandise be exported. The provision that other than duty-free merchandise may be delivered to an individual departing from the Customs Territory does not impose any requirement of exportation. The difference in treatment between duty-free merchandise and other merchandise set by statute contradicts the commenter's assertion that all merchandise sold by a duty-free enterprise must be exported. Under 19 U.S.C. 1555(b)(5), duty-free stores may sell "merchandise other than duty-free merchandise, except that such other merchandise may not be stored in a bonded warehouse facility other than a bonded facility used for retail sales." By virtue of 26 U.S.C. 4081 and 19 U.S.C. 1555(b)(8)(E), gasoline and diesel fuel entered under a consumption entry into the U.S. is not duty-free merchandise; it is merchandise other than duty-free merchandise. In fact, merchandise that is subject to any Federal duty or tax could not be merchandise covered by the notice required by 19 U.S.C. 1555(b)(C)(i).

Citing the Court of International Trade's opinion in Ammex Inc. v. U.S., 116F. Supp.2d 1269 (Ct. Int'l Trade 2000), the commenter further contends that the application of 26 U.S.C. 4081 would "nullify" 19 U.S.C. 1555 and 1557 entirely with respect to the entry and sale of gasoline and diesel fuel, thus negating the duty-free and class 9 bonded warehouses themselves. Customs does not agree. The commenter's argument confuses 19 U.S.C. 1557(a)(1) and 19 U.S.C. 1555(b)(1) and (8)(E). Section 1557(a)(1) sets forth the general rule applicable to all Customs warehouses that "[a]ny merchandise subject to duty with the exception of perishable articles and explosive substances other than firecrackers, may be entered for warehousing and be deposited in a bonded warehouse * * *" However, as discussed earlier, "1555(b)(1) and (8)(E) impose special requirements for the operation of class 9 warehouses, namely that only merchandise "on which neither Federal duty nor Federal tax has been assessed pending exportation from the customs territory" may be placed in class 9 warehouses. Moreover, contrary to the commenter's assertion, the Court of International Trade has specifically found that Customs regulations implementing 19 U.S.C." 1555(b)(1) and (8)(E), 19 CFR" 19.35(a) and 19.36(e), are completely consistent with the general rule contained in 19 U.S.C. 1557(a)(1). Ammex Inc. v. U.S., 116F. Supp.2d at 1275, n.9. Consequently, nothing prevents gasoline and diesel fuel from being entered into a Customs warehouse; they simply cannot be placed in a class 9 warehouse and sold as duty-free merchandise. Under 1555(b)(5), operators of duty-free stores are free to sell gasoline and diesel fuel from a bonded facility used for retail sales. Other goods that are not governed by 26 U.S.C. 4081 may still be eligible for "conditionally duty-free merchandise" status. Finally, this commenter argues that Customs was unclear as to the effective date of revocation. The effective date of the Customs Service's revocation of the Port Director's letter of September 5, 2000 is sixty days after the date of publication of this notice. The second comment by Ram Control, simply asserts, without analysis or support, that duty-free fuel meets the requirements of sales from duty-free locations and that the U.S. Court of International Trade was correct in their decision to uphold the request of Ammex Detroit to offer such a commodity. Customs has already pointed out that the statute authorizing entry into class 9 Customs bonded warehouses, 19 U.S.C. 1555(b), provides for the entry only of duty-free merchandise. Paragraph (8)(E) of that statute defines duty-free merchandise to mean merchandise sold by a duty-free sales enterprise on which neither Federal duty nor Federal Tax has been assessed. The imported gasoline and diesel fuel at issue was assessed with a tax under 26 U.S.C. 4081, as implemented by 26 CFR 48.4081. Consequently, any fuel that does not meet the statutory definition of duty-free merchandise, is not eligible for entry into a class 9 Customs bonded warehouse. Only fuel on which neither duty nor tax has been assessed can qualify as duty-free fuel in conformity with 19 U.S.C. 1555(b)(8)(E). Because, 26 U.S.C. 4081 imposes a tax upon entry into the United States of any taxable fuel for consumption, use, or warehousing this fuel cannot qualify for duty-free status and cannot be sold as duty free merchandise from class 9 Customs bonded warehouses. It can continue to be sold from a class 9 Customs bonded warehouse as other than duty free merchandise under 19 U.S.C. 1555(b)(5).

Secondly the comment states that the allowance of offering duty-free fuel would help to revitalize the duty-free business and help to increase traffic and tourism dollars for the local communities. This is an issue that is outside of the jurisdiction of Customs that would be more properly addressed by Congress. Customs, pursuant to 625(c)(1), Tariff Act of 1930 (19

U.S.C. 1625(c)(1)), as amended by Title VI, is revoking the letter of the Port Director, Detroit dated September 5, 2000, that was issued to Ammex and any other ruling not specifically identified, to reflect the proper classification of the merchandise pursuant to the analysis set forth in Headquarters Ruling Letter (HQ) 229215. See attachment "A" to this document. In addition, pursuant to 625(c)(2), Tariff Act of 1930 (19 U.S.C. 1625(c)(2)), as amended by Title VI, Customs is revoking any treatment previously accorded by Customs to substantially identical transaction. This treatment may, among other reasons, have been the result of the importer's reliance on a ruling issued to a third party, Customs personnel applying a ruling of a third party to importations involving the same or similar merchandise, or the importer's or Customs previous interpretation of the Harmonized Tariff Schedule of the United States. Any person involved in substantially identical transactions should have advised Customs during the notice period. An importer's reliance on a treatment of substantially identical transactions or on a specific ruling concerning the merchandise covered by this notice which was not identified in this notice may raise the rebuttable presumption of lack of reasonable care on the part of the importer or its agents for importations subsequent to the effective date of this final decision. In accordance with 19 U.S.C. 1625(c), this ruling will become effective 60 days after publication in the CUSTOMS BULLETIN.

Dated: November 1, 2001.

John Durant

Director
Commercial Rulings Division

[Attachments]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC.
Category: Drawback Refund
MR. HERBERT C. SHELLEY
STEPTOE & JOHNSON, L.L.P.
1330 Connecticut Avenue, NW
Washington, DC 20036-1795

DEAR MR. SHELLEY:

This is in reference to your comment filed on July 3, 2001 pertaining to the Notice of June 20, 2001 to revoke the letter of the Port Director at Detroit dated September 5, 2000 to Mr. Levesque, President of Ammex Detroit, Duty Free.

Pursuant to section 625(c), Tariff Act of 1930, as amended (19 U.S.C. 1625(c)), notice of the proposed revocation of the Port Director, Detroit, letter to Ammex, Inc. granting its request to expand its operation of a class 9 Customs warehouse to include gasoline and diesel fuel, was published on June 20, 2001, in Volume 35, Number 25, of the CUSTOMS BULLETIN. Two comments were received in opposition to the proposed revocation. After careful consideration of the comment, as set forth in this notice, we have determined to proceed with the revocation.

The issue under consideration is whether diesel fuel and gasoline for which a Federal Tax has been assessed can qualify as duty-free merchandise for the purposes of entry into a Class 9 Customs bonded warehouse. Only fuel on that neither duty nor tax has been assessed can qualify as duty-free fuel in conformity with 19 USC 1555(b)(8)(E). This same statute defines duty-free merchandise as merchandise on which neither Federal duty nor Federal tax has been assessed pending exportation. However because, 16 USC 4081 imposes a tax upon entry into the United States of any taxable fuel for consumption, use, or warehousing this fuel cannot qualify for duty-free status and cannot be sold from class 9 Customs bonded warehouses.

John Durant
Director
Commercial Rulings Division

[ATTACHMENT B]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC.
Category: Drawback Refund
MR. LEE MATTHEWS
RAM CONTROL
P.O. Box 3
Champlain, NY 12919

DEAR MR. MATTHEWS:

This is in reference to your comment filed on July 3, 2001 pertaining to the Notice of June 20, 2001 to revoke the letter of the Port Director at Detroit dated

September 5, 2000 to Mr. Levesque, President of Ammex Detroit, Duty Free.

Pursuant to section 625(c), Tariff Act of 1930, as amended (19 U.S.C. 1625(c)), notice of the proposed revocation of the Port Director, Detroit, letter to Ammex, Inc. granting its request to expand its operation of a class 9 Customs warehouse to include gasoline and diesel fuel, was published on June 20, 2001, in Volume 35, Number 25, of the CUSTOMS BULLETIN. Two comments were received in opposition to the proposed revocation. After careful consideration of the comment, as set forth in this notice, we have determined to proceed with the revocation. The issue under consideration is whether diesel fuel and gasoline for which a Federal Tax has been assessed can qualify as duty-free merchandise for the purposes of entry into a Class 9 Customs bonded warehouse. Only fuel on that neither duty nor tax has been assessed can qualify as duty-free fuel in conformity with 19 USC 1555(b)(8)(E). This same statute defines duty-free merchandise as merchandise on which neither Federal duty nor Federal tax has been assessed pending exportation. However because, 16 USC 4081 imposes a tax upon entry into the United States of any taxable fuel for consumption, use, or warehousing this fuel cannot qualify for duty-free status and cannot be sold from class 9 Customs bonded warehouses.

John Durant
Director
Commercial Rulings Division

(2)

Supreme Court, U.S.
FILED
APR 14 2004
OFFICE OF THE CLERK

No. 03-1004

In the Supreme Court of the United States

AMMEX, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

THEODORE B. OLSON
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Counsel of Record

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Washington, D.C. 20530-0001
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BEST AVAILABLE COPY

QUESTIONS PRESENTED

After the Court of International Trade issued a decision holding that the fact that gasoline and diesel fuel are "unidentifiable fungibles" does not remove them from the category of "duty-free merchandise" that may be sold under 19 U.S.C. 1555(b), the United States Customs Service ruled that petitioner's gasoline and diesel fuel do not satisfy the definition of "duty-free merchandise" in 19 U.S.C. 1555(b)(8)(E) because they are subject to federal taxes. The questions presented are:

1. Whether the ruling of the Customs Service contravenes the Court of International Trade's interpretation of a federal statute.

2. Whether the decision of the Court of International Trade is a res judicata bar to the ruling by the Customs Service.

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In the Supreme Court of the United States

No. 03-1004

AMMEX, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-11a) is reported at 334 F.3d 1052. The opinion of the Court of International Trade (Pet. App. 12a-23a) is reported at 193 F. Supp. 2d 1325. An earlier opinion of the Court of International Trade (Pet. App. 26a-41a) is reported at 116 F. Supp. 2d 1269.

JURISDICTION

The judgment of the court of appeals was entered on July 1, 2003. A petition for rehearing was denied on October 7, 2003 (Pet. App. 24a-25a). The petition for a writ of certiorari was filed on January 5, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This case involves provisions of the Tariff Act of 1930, ch. 497, 46 Stat. 590, as amended by the Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, 102 Stat. 1107, which is codified in Chapter 4 of Title 19 of the United States Code. Section 1555(b)(1) of Title 19 provides that "duty-free sales enterprises may sell and deliver for export from the customs territory duty-free merchandise in accordance with this subsection and such regulations as the Secretary may prescribe to carry out this subsection." The term "duty-free merchandise" is defined in Section 1555(b)(8)(E) as "merchandise sold by a duty-free sales enterprise on which neither Federal duty nor Federal tax has been assessed pending exportation from the customs territory." Section 1557(a)(1) provides, in part, that "[a]ny merchandise subject to duty * * * , with the exception of perishable articles and explosive substances other than firecrackers, may be entered for warehousing and be deposited in a bonded warehouse * * * [and] may be withdrawn for exportation." A "bonded warehouse" is a building, or part of a building, used for "the storage of imported merchandise." 19 U.S.C. 1555(a).

2. Petitioner operates a duty-free store in Detroit, Michigan, that qualifies as both a "duty-free enterprise" and a "bonded warehouse." The store is adjacent to the Ambassador Bridge, which connects the United States and Canada. In January 1994, petitioner requested approval from the United States Customs Service (Customs)[1] to sell gasoline and diesel fuel on a duty-free basis. In June 1994, Customs issued Headquarters Ruling (HQ) 225287, which determined that duty-free

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[1] The Customs Service is now the Bureau of Customs and Border Protection.

gasoline and diesel fuel may not be sold at a duty-free store under 19 U.S.C. 1555(b). The basis for the ruling was that "unidentifiable fungibles" like gasoline and diesel fuel could not be marked or otherwise identified, and that Customs would therefore have no practical way of ensuring that such merchandise was declared when vehicles returned to the United States. In February 1998, Customs reaffirmed HQ 225287 in HQ 227385. Pet. App. 2a-3a, 27a-29a, 44a-52a, 53a-65a.

3. Petitioner challenged HQ 225287 and HQ 227385 in the Court of International Trade. Holding that the Customs rulings violated 19 U.S.C. 1557(a)(1), the court granted petitioner's motion for judgment on the agency record. Because Section 1557(a)(1) permits "any merchandise subject to duty" to be deposited in a bonded warehouse and withdrawn for exportation unless the merchandise constitutes "perishable articles" or "explosive substances," and because gasoline and diesel fuel are neither perishable articles nor explosive substances, the court concluded that Customs' exception for "unidentifiable fungibles" had no basis in the statute. Pet. App. 26a-41a.

4. In September 2000, Customs granted petitioner's request to allow the sale of gasoline and diesel fuel at its duty-free store. The next month, petitioner requested certification from Customs that the gasoline and diesel fuel were exempt from federal taxes. Customs forwarded petitioner's request to the Internal Revenue Service (IRS), which issued an informational letter stating that Section 4081 of the Internal Revenue Code imposes a tax on the entry into the United States of any taxable fuel, including gasoline and diesel fuel, for consumption, use, or warehousing. On the basis of the IRS letter, Customs determined that it could not lawfully permit petitioner to sell gasoline and diesel fuel

on a duty- and tax-free basis, because 19 U.S.C. 1555(b)(8)(E) defines "duty-free merchandise" as merchandise on which no federal duty or federal tax has been assessed "pending exportation from the customs territory." Accordingly, in November 2001, Customs revoked its approval. Pet. App. 4a-5a, 8a, 14a-15a, 95a-100a, 101a-114a.

5. Petitioner filed a motion in the Court of International Trade for an order to show cause why Customs should not be held in contempt. The court denied the motion. It held that Customs' revocation of approval to sell gasoline and diesel fuel on a duty- and tax-free basis did not violate the court's earlier decision, because the parties had merely assumed that the gasoline and diesel fuel qualified as "duty-free merchandise" under 19 U.S.C. 1555(b)(8)(E) and the court did not address that issue. The court also rejected petitioner's claim that res judicata precluded Customs from revoking its approval. Pet. App. 12a-23a.[2]

6. The court of appeals affirmed. Pet. App. 1a-11a.

The court first held that res judicata did not preclude Customs from revoking its approval. Pet. App. 5a-11a. Quoting this Court's decision in *Federated Department Stores, Inc.* v. *Moitie*, 452 U.S. 394, 398 (1981), the court of appeals observed that, under the doctrine of res judicata, "[a] final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action." Pet. App. 6a. Citing this Court's decision in

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[2] Approximately three months after the Court of International Trade denied petitioner's request to hold Customs in contempt, petitioner filed a separate challenge to the revocation of authorization in the same court. See *Ammex, Inc.* v. *United States*, No. 02-0361. That case is still pending.

Parklane Hosiery Co. v. *Shore*, 439 U.S. 322, 326 n.5 (1979), the court then noted that res judicata requires proof of three elements; that the parties are identical or in privity; that the first suit proceeded to a final judgment on the merits; and that the second claim is based on the same set of transactional facts as the first. Pet. App. 6a. The court concluded that the first two elements were established but that petitioner could not establish the third element, because the two claims were not based on the same set of transactional facts. *Id.* at 6a-10a. Although "the ultimate effect of both claims was to determine whether [petitioner] may sell gasoline and diesel fuel duty-free," the court explained, the claims are "sufficiently different," because the first claim was that Customs' "unidentifiable fungibles" rulings were inconsistent with 19 U.S.C. 1557(a)(1) and the second claim challenged Customs' determination that the taxability of petitioner's gasoline and diesel fuel under 26 U.S.C. 4081 precludes them from qualifying as "duty-free merchandise" under 19 U.S.C. 1555(b)(8)(D). Pet. App. 8a-10a.

The court of appeals also held that the Court of International Trade did not abuse its discretion in refusing to hold Customs in contempt for revoking its approval. Pet. App. 11a. The court explained that "[a]n agency may change its policy position based on a reasonable explanation," and the IRS ruling on the tax issue "provided such a basis." *Ibid.*

ARGUMENT

The decision of the court of appeals is both fact-bound and correct, and it does not conflict with any decision of this Court or of any other court of appeals. Further review is therefore unwarranted.

1. Petitioner contends that Customs' revocation of approval to sell gasoline and diesel fuel on a duty- and tax-free basis violated the principle that "[a]dministrative agencies may not contravene a judicial statutory construction." Pet. 12. For that reason, petitioner says (Pet. 12-14), the court of appeals' decision is inconsistent with this Court's statement in *Neal* v. *United States*, 516 U.S. 284 (1996), that, once this Court has determined a statute's unambiguous meaning, it will "adhere to [its] ruling under the doctrine of *stare decisis*" and "assess an agency's later interpretation of the statute against that settled law." *Id.* at 295. Petitioner is mistaken. The principle on which it relies is not applicable here, and the court of appeals' decision does not conflict with *Neal.*

The question of statutory interpretation decided by the Court of International Trade was whether "unidentifiable fungibles" like gasoline and diesel fuel are excepted from the category of "duty-free merchandise" that duty-free enterprises are permitted to sell under 19 U.S.C. 1555(b). Pet. App. 30a-35a, 38a-41a. In holding that they are not, the court relied on 19 U.S.C. 1557(a)(1), which allows any merchandise, with two exceptions not applicable here, to be deposited in, and withdrawn from, bonded warehouses. *Ibid.* Customs' decision to revoke approval not only did not contravene the court's decision on that question of statutory interpretation, it had nothing to do with that question. Customs' decision was instead based on a determination that petitioner's gasoline and diesel fuel did not satisfy the definition of "duty-free merchandise" in 19 U.S.C. 1555(b)(8)(E), because they are subject to federal tax. That this is an entirely separate issue was recognized by both of the courts below (Pet. App. 8a-10a, 17a-22a), including the one whose decision Customs supposedly contravened.

2. Petitioner also contends (Pet. 14-20) that the court of appeals misapplied principles of res judicata. In particular, it contends (Pet. 15-20) that the basis for Customs' revocation of its approval—that petitioner's gasoline and diesel fuel were taxable and therefore not "duty-free merchandise" under 19 U.S.C. 1555(b)(8)(E)—is a legal theory that could, and should, have been raised either in the Headquarters Rulings themselves or in the Court of International Trade when petitioner challenged the rulings. This contention was rejected by both the trial court and the court of appeals, and it does not warrant further review.

As an initial matter, petitioner does not contend that the court of appeals applied an incorrect legal standard. Compare Pet. App. 6a (court of appeals identifies three elements for claim of res judicata) with Pet. 16 (petitioner identifies same three elements). Its contention, at bottom, is that the court of appeals applied a correct legal standard incorrectly. A petition for a writ of certiorari is "rarely granted," however, when the asserted error consists of "the misapplication of a properly stated rule of law." Sup. Ct. R. 10.

In any event, petitioner is mistaken in its contention that the court of appeals' fact-specific decision is erroneous. An agency is not required to raise every possible justification for a particular decision in its administrative ruling or in defending a ruling against a legal challenge, and res judicata does not bar an agency from exercising its regulatory authority to consider additional legal or factual issues if the agency decision is set aside.

The court of appeals correctly held (Pet. App. 6a-10a) that the two claims at issue here are based on different "transactional facts," and that petitioner therefore cannot satisfy the third element of res judicata. In the first claim—the challenge to Customs' rulings that gasoline and diesel fuel are "unidentifiable fungibles" and thus cannot be sold in duty-free stores—petitioner contended, on the sole basis of the administrative record, that the rulings violated 19 U.S.C. 1557(a)(1). The second claim—petitioner's challenge to Customs' determination that petitioner's gasoline and diesel fuel are taxable and thus are not "duty-free merchandise" under 19 U.S.C. 1555(b)(8)(E)—involved a different decision, based on a different administrative record, that was made after petitioner's first claim had been resolved by the Court of International Trade. Since the two claims concerned different administrative decisions, and were based on different administrative records, they were not "based on the same set of transactional facts" (Pet. 16), and there is no res judicata bar. Cf. *FTC* v. *Raladam Co.*, 316 U.S. 149, 151 (1942) (second administrative finding of unfair competition not precluded by vacatur of first finding of unfair competition, because two cases arise "out of different proceedings" and present "different facts and a different record").

Contrary to petitioner's contention, the Customs decision that is the subject of the second claim involves "new fact[s]," not merely "a new legal theory" that could have been raised in the Headquarters Rulings or the Court of International Trade. Pet. 18, 19. After the trial court rejected Customs' ruling that "unidentifiable fungibles" cannot be sold in duty-free stores and Customs granted petitioner authority to sell duty-free gasoline and diesel fuel, petitioner asked Customs to certify that the merchandise was exempt from federal taxes. Customs, which does not interpret the tax laws, forwarded petitioner's request to the IRS, which issued an informational letter stating that the gasoline and diesel fuel were subject to taxes. These "subsequent events" (Pet. App. 20a) cannot reasonably be characterized as the equivalent of a new legal theory. Since the challenge to the Headquarters Rulings had been litigated on "the presumption that the gasoline and diesel fuel at issue qualified as 'duty-free merchandise'" (*ibid.*), the IRS letter and the information in it are new facts, which were not part of the basis for the first claim. See also *id.* at 11a ("IRS ruling" provided basis for Customs to change its position on whether petitioner could sell gasoline and diesel fuel on duty- and tax-free basis).

Not only was Customs not obligated to defend its Headquarters Rulings in the Court of International Trade on the alternative ground that petitioner's gasoline and diesel fuel are taxable (and therefore not "duty-free merchandise" under 19 U.S.C. 1555(b)(8)(E)), it is unlikely that Customs "could have raised" that theory (Pet. 19) even if it had desired to do so. Review of Customs' rulings was based on the administrative record as it existed at the time of the rulings, see Pet. App. 30a (citing 5 U.S.C. 706 and *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 420 (1971)), and the fact that petitioner's merchandise was subject to federal taxes was not part of that record.[3] Even if it had been, moreover, the court would have been prohibited from upholding Customs' rulings on any alternative ground, because an administrative decision must stand or fall on the grounds articulated by the agency, *SEC* v. *Chenery Corp.*, 318 U.S. 80, 87-88 (1943), and the taxability of petitioner's gasoline and diesel fuel was not one of those grounds.

---

[3] Petitioner contends (Pet. 5, 18) that the tax issue was part of the administrative record, but as the court of appeals correctly recognized in rejecting that claim, the portion of the record identified by petitioner (see Pet. App. 46a) "deal[s] with forwarding warehouse entry documents to the IRS, and not the question of whether federal tax was due on the gasoline and diesel fuel" (*id.* at 9a).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 03-1004

In the
Supreme Court of the United States

AMMEX, INC.
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

**On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Federal Circuit**

REPLY BRIEF FOR PETITIONER

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ARGUMENT

The United States' Brief in Opposition establishes that this Court should grant Ammex's petition.

I. THE COURT SHOULD GRANT CERTIORARI BECAUSE THIS CASE RAISES THE IMPORTANT QUESTION OF WHETHER *RES JUDICATA* BINDS THE UNITED STATES AND ITS AGENCIES.

The United States belies its contention that the court of appeals' decision was "fact specific" by arguing in the next sentence that:

> an agency is not required to raise every possible justification for a particular decision in . . . defending a ruling against a legal challenge, and res judicata does not bar an agency from exercising its regulatory authority to consider additional legal or factual issues if the agency decision is set aside.

(Opp. at 7.) The United States also claims that *res judicata* did not apply to Customs:

> Customs [was] not obligated to defend its Headquarters Rulings in the Court of International Trade on the alternative ground that petitioner's gasoline and diesel fuel are taxable and therefore not "duty-free merchandise . . .."

(Opp. at 9.)

The United States cited no authority in support of its claim that *res judicata* does not apply to federal agencies. This Court has recognized that *res judicata* unquestionably does apply against the United States, its agencies and officers. *Alaska Department of Environmental Conservation v. Environmental Protection Agency*, 124 S. Ct. 983, 1003, n. 14 (2004); *United States v. Mendoza*, 464 U.S. 154, 163

(1984) ("res judicata, of course, prevents the government from relitigating the same cause of action against parties to a prior decision"); *see also United States v. Cty. of Cook*, 167 F.3d 381, 385 (7th Cir. 1999)("for a long time it has been understood that the United States, like a private litigant, cannot relitigate claims that have reached a full judgment").

Thus, the United States' Brief in Opposition demonstrates that this case raises important questions relating to the finality of litigation involving federal agencies in general. If the decisions below are not reversed, in the future the United States will use them in support of its claim that *res judicata* does not bind the United States. Therefore, this case raises important issues worthy of granting Ammex's petition because the decisions threaten long-standing *res judicata* principles, which prohibit the United States from litigating "by piecemeal, as by presenting a part only of the available grounds and reserving others for another suit, if failing in that." *Grubb v. Public Utilities Comm'n*, 281 U.S. 470, 478 (1930).

II. THE COURT OF APPEALS DECISION NECESSARILY MEANS THAT *RES JUDICATA* DOES NOT APPLY TO A JUDGMENT AGAINST AN AGENCY

A. *Ammex II* Contravened the Statutory Construction in *Ammex I*.

The United States argues that Customs' decision to revoke approval of Ammex's duty-free motor fuel sales did not contravene the decision in *Ammex I* (Opp. at 6), which held unequivocally that "19 U.S.C. §§ 1555 and 1557 allow the duty-free sale of gasoline and diesel fuel from a duty-free enterprise." (App. at 42a.) The United States claims that the decision in *Ammex I* narrowly construed only two subsections of the OTCA — 19 U.S.C. §§ 1555(b) and 1557(a)(1) and did not consider the issue of whether motor fuel sold from Ammex's duty-free sales enterprise satisfied the 19 U.S.C. § 1555(b)(8)(E) definition of "duty-free merchandise" if motor fuel tax is assessed under I.R.C. § 4081(A)(1)(a)(iii). (Opp. at 6.) Rather, the United States and the Court of International Trade presumed during *Ammex I* that the motor fuel satisfied this definition. (Opp. at 9.) *Arizona v. California*, 530 U.S. 392, 395 (2000) ("The Court disapproves the notion that a party may wake up and effectively raise a defense years after the first opportunity to raise it so long as the party was (though no fault of anyone else) in the dark until its late awakening").

However, the Court of International Trade in *Ammex I* analyzed in-depth the OTCA statutory scheme, including its history and applicable regulations. (App. 39a-40a, n. 6-8.) Based on that in-depth analysis, the Court of International Trade concluded that:

> In view of §1557(a)(1)'s instruction that 'any merchandise subject to duty' may be entered and then withdrawn from a bonded warehouse, the court finds that Customs violated this provision in promulgating HQ 227385. Section 1557(a)(1) provides that all types of dutiable merchandise may be sold from bonded warehouses, including duty-free stores, and it was error for the government to read into 19 U.S.C. § 1555(b)(3)(D) and (E) an exception beyond those specifically stated in § 1557(a)(1).

(App. 34a-35a.) The I.R.C. § 4081(A)(1)(a)(iii) defense is the United States' attempt to posthumously impose yet another illegal exception to that rule. Customs' revocation contravened the decision in *Ammex I* because that decision considered the OTCA statutory scheme regulating duty-free sales enterprises and concluded without qualification that "19

U.S.C. §§ 1555 and 1557 allow the duty-free sale of gasoline and diesel fuel from a duty-free enterprise." (App. at 42a.) The United States' position would permit federal agencies to litigate piecemeal each of the statutory subsections administered by a federal agency, and other statutes, *ad infinitum*. That outcome conflicts with *res judicata* principles and would virtually eliminate finality in such cases.

B. The United States Could Have Raised the I.R.C. § 4081(A)(1)(a)(iii) Defense in *Ammex I* Because It Was a Legal Defense.

The United States asserts that *res judicata* does not bar the I.R.C. § 4081 defense raised in Customs' revocation because *Ammex I* considered only whether gasoline and diesel fuel are "unidentifiable fungibles" that cannot be sold from duty-free stores pursuant 19 U.S.C. §§ 1555 and 1557 and did not consider the application of I.R.C. § 4081 to those same statutes. (Opp. 8.) The United States further argues that Customs' revocation was based on a different administrative record than that considered in *Ammex I*. (*Id.*)

However, Ammex's claim in *Ammex I* that the OTCA authorizes duty-free motor fuel sales is based on the same transactional facts that prompted Customs' revocation (i.e., Ammex sold motor fuel from its sterile duty-free store operated under 19 U.S.C. §§ 1555 and 1557). No facts changed and no new facts arose. Customs merely raised a purported legal defense that it could have, but did not, raise in *Ammex I*.

Moreover, the administrative record was the same in each case, with the sole exception of the application of I.R.C. § 4081(A)(1)(a)(iii) to these common transactional facts. Indeed, Customs' revocation states:

> IRS has not provided Customs with any information from Ammex's tax returns; it *has merely informed*

> *Customs that 26 USC 4081 imposes a tax upon entry of gasoline and diesel fuel. This decision does not determine whether Ammex actually paid the tax. The only determination is that fuel which is assessed a tax under § 4081 cannot qualify for entry under 19 USC 1555(B)(1).*

(App. 105a-106a.) [Emphasis added.] Thus, the United States admitted in its administrative proceeding that it considered no new facts but rather woke up to the I.R.C. § 4081(A)(1)(a)(iii) legal defense after losing *Ammex I. Arizona*, 530 U.S. at 395.

Not only did Customs' revocation involve no new facts, the United States did not need any new facts to raise the defense that fuel, once assessed a tax under § 4081, cannot qualify for entry under 19 USC 1555(b)(1). I.R.C. § 4081(A)(1)(a)(iii) provides that:

> There is hereby imposed a tax at the rate specified in paragraph (2) on . . .
>
> * * *
>
> (iii) the entry into the United States of any taxable fuel for consumption, use, or warehousing."

(App. 79a.) No additional facts were necessary to raise such a defense since Ammex, a duty-free sales enterprise, is in the business of entering fuel for warehousing in the sense that term is used with respect to duty-free enterprises. 19 U.S.C. § 1557(a)(1). (App. 75a.) In *Ammex I*, the Court of International Trade accepted Ammex's argument that 19 U.S.C. § 1557(a)(1) permits the entry and withdrawal (for exportation) of motor fuel from bonded warehouses such as Ammex. (App. 30a-37a, 42a.)

Moreover, the Treasury regulations applicable to I.R.C. § 4081 provide that Customs law determines the identity of the "enterer" and the time that such fuel is entered under I.R.C. § 4081. In other words, Customs law determines who pays the tax and when it is imposed. Treas. Reg. § 48.4081-1 provides, in relevant part, that:

> Enterer generally means the importer of record (under customs law) with respect to the taxable fuel. However, if the importer of record is acting as an agent (for example, the importer of record is a customs broker engaged by the owner of the taxable fuel), the person for whom the agent is acting is the enterer. If there is no importer of record for taxable fuel entered into the United States, the owner of the taxable fuel at the time it is brought into the United States is the enterer.
>
> Entry of taxable fuel into the United States occurs when--
>
> (1) The taxable fuel is brought into the United States and applicable customs law requires that the taxable fuel be entered into the United States for consumption, use, or warehousing . . .

Similarly, the legislative history of I.R.C. § 4081(A)(1)(a)(iii) indicates that Congress intended that Customs law determines when motor fuel is entered:

> The entry of gasoline into the United States is considered to occur at the time the gasoline is transferred from customs custody unless the gasoline is transferred in bulk to a terminal."

H.R. Conf. Rep. No. 101-964 at 1052, reprinted in 1990 U.S.C.C.A.N. 2017, 2757.

Customs law controls who owes the I.R.C. § 4081(A)(1)(a)(iii) tax and when the tax is imposed (upon "entry"). In short, the application of I.R.C.

§ 4081(A)(1)(a)(iii) to 19 U.S.C. § 1555(b)(8)(E) is not a new fact, and was nothing new to Customs, but is rather a new legal theory, which could have been, but was not, raised in *Ammex I*.

The United States' argument that "it is unlikely" that the United States could have raised the I.R.C. § 4081(A)(1)(a)(iii) defense in Court of International Trade because it was not part of the agency record (Opp. 9), assumes the erroneous conclusion that I.R.C. § 4081(A)(1)(a)(iii) was a new fact. As amply demonstrated above, no new facts were considered and I.R.C. § 4081 tax was in fact mentioned in the agency record. (App. 46a.)

Assuming *arguendo* that the United States could not have raised the I.R.C. § 4081(A)(1)(a)(iii) defense in the Court of International Trade, *res judicata* doctrine still bars that defense because the United States failed to raise it in its administrative proceeding. From the beginning, Ammex sought authorization to sell motor fuel from its duty-free sales enterprise. (App. 44a.) In denying such authorization, the United States was required to present all defenses to Ammex's claim or have such defenses barred by *res judicata*. *United States v. Utah Construction and Mining Co.*, 384 U.S. 394, 422 (1966) (courts have not hesitated to apply *res judicata* where administrative agency acts in judicial capacity). Here, Customs acted in a judicial capacity in construing 19 U.S.C. §§ 1555 and 1557. Therefore, *res judicata* required Customs to raise all defenses, including I.R.C. § 4081(A)(1)(a)(iii), in denying such authorization. A contrary result would permit federal agencies to relitigate each subsection of the statute administered *ad infinitum* and virtually eliminate finality in such cases. *Cty. of Cook*, 167 F.3d at 358-86 (United States conceded that sovereign immunity exception to *res judicata* would logically lead to United States relitigating *ad infinitum*).

CONCLUSION

Therefore, Petitioner respectfully requests that this Court grant this petition for writ of certiorari, reverse the decision of the United States Court of Appeals for the Federal Circuit and the Court of International Trade in *Ammex II*, and hold that the decision in *Ammex I* binds the United States and precludes the United States from re-litigating the issue of whether the OTCA authorizes Ammex to sell tax and duty-free motor fuel from its duty-free sales enterprise.

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